

# **TRANSCRIPT OF RECORD**

---

**Supreme Court of the United States**

**OCTOBER TERM, 1939**

**No. 15**

---

**L. BOTELER, TRUSTEE OF THE ESTATE OF RICH-  
MAID CREAMERIES, INC., DEBTOR, PETITIONER,**

**vs.**

**RAY INGELS, DIRECTOR OF MOTOR VEHICLES  
OF THE STATE OF CALIFORNIA, ET AL.**

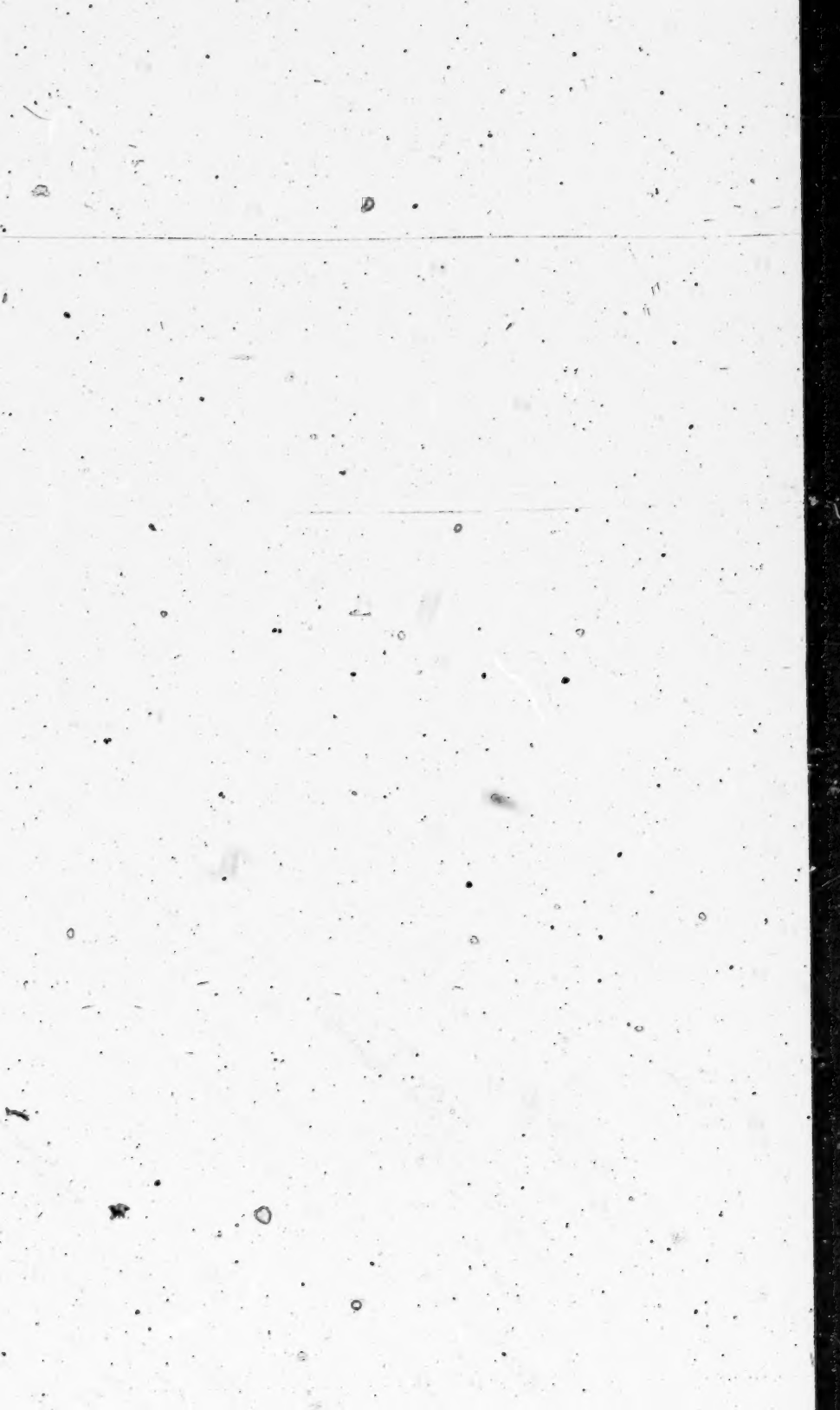
---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

---

**PETITION FOR CERTIORARI FILED MARCH 14, 1939.**

**CERTIORARI GRANTED APRIL 24, 1939.**



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 15

L. BOTELE, TRUSTEE OF THE ESTATE OF RICH-  
MAID CREAMERIES, INC., DEBTOR, PETITIONER,

vs.

RAY INGELS, DIRECTOR OF MOTOR VEHICLES  
OF THE STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT

## INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Ninth Circuit.....	1	1
Names and addresses of attorneys... (omitted in printing) ..	1	
Record from D. C. U. S., Southern District of California.....	2	1
Citation with proof of service... (omitted in printing) ...	2	
Petition for order setting aside penalties against bank- rupt .....	6	1
Order to show cause .....	10	3
Amended petition .....	11	4
Amended order to show cause .....	17	7
Opinion, Utley, referee.....	19	8
Findings of fact and conclusions of law and order of referee .....	37	21
Petition for review of order of referee.....	45	27
Referee's certificate on petition for review.....	57	36
Referee's supplemental certificate on petition for review.	60	37
Order dated October 22, 1937, granting order to show cause, denying petition for review of order of referee and confirming findings and order of referee.....	61	38

## Record from D. C. U. S., Southern District of California—

Continued.	Original	Print
Statement of evidence.....	62	39
Statement of evidence and proceedings at hearing before referee .....	63	40
Testimony on behalf of trustee: Boteler, L.—		
Direct examination .....	64	41
Cross-examination .....	68	44
Redirect examination .....	70	45
Trustee's Exhibit No. 1—Letter dated February 20, 1937 .....	65	41
Final report, final account and petition for dis- charge by permanent trustee.....	73	47
Statement of receivership of the Richmald Creameries, Inc. ....	79	51
First report and account of L. Boteler, trustee, petition for expenses and dividend.....	84	54
Exhibit B—Receipts and disbursements....	91	59
Stipulation for approval of statement of evidence...	99	64
Order approving statement of evidence.....	100	65
Petition for appeal and order allowing same—D. C. U. S.	101	65
Assignments of error filed in D. C. U. S.....	105	67
Petition for appeal filed in U. S. C. C. A.....	109	70
Assignments of error filed in U. S. C. C. A.....	113	72
Order allowing appeal—U. S. C. C. A.....	116	74
Bond on appeal .....	118	(omitted in printing)
Stipulation in lieu of praecipe for record.....	121	75
Clerk's certificate .....	124	78
Order of submission .....	129	83
Order directing filing of opinion and decrees.....	129	83
Opinion, Garrecht, J. ....	131	85
Decree .....	144	98
Clerk's certificate .....	146	100
Order allowing certiorari.....	147	101



[fols. 1-2] Names and addresses of attorneys omitted in printing.

[fols. 3-5] Citations, in usual form, showing service on David Schwartz, filed November 26, 1937, omitted in printing.

[fol. 6]

**IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

No. 28563-C

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor

PETITION FOR ORDER SETTING ASIDE PENALTIES AGAINST  
BANKRUPT—Filed March 6, 1937

To the Honorable Ernest R. Utley, Referee in Bankruptcy:

The Petition of L. Boteler, respectfully shows:

**I**

That your Petitioner is the duly qualified and acting Trustee in Bankruptcy of the above entitled bankrupt and that as such Trustee has now and was in possession of all of the assets of said bankrupt and particularly the personal property hereinafter described.

**II**

That at all times mentioned herein, Ray Ingels was and still is the Director of the Department of Motor Vehicles of the State of California and Howard E. Deems was and still is the Registrar of Vehicles for the State of California.

**III**

That heretofore your petitioner has tendered and offered to pay to the Department of Motor Vehicles of and for the State of California, the proper vehicle license and registration fees for the year 1937 upon all of the motor vehicles hereinafter described and that the said Ray Ingels as such Director and the said Howard E. Deems as such Registrar of Motor Vehicles, and each of them, have re-

fused and still refuse to issue the 1937 license upon said motor vehicles to your petitioner as such Trustee in Bankruptcy unless your petitioner pays in addition to the usual and proper fees heretofore mentioned and tendered, the penalties assessed against such motor vehicles and hereinafter enumerated, namely, the following:

Description of Vehicle	Engine Number	1936 License	Penalty
Ford V-8	18-800655	2X7140	\$6.35
Ford-4	AA12550	K-6764	11.55
Ford V-8	1245685	K-6773	14.25
Ford V-8	18-725243	K-6770	13.25
Ford-4	AA4078994	K-6771	12.00
Ford-4	AA1958177	K-6772	11.70
Ford-4	AAB5057502	K-6767	12.25
Ford-4	AA3303515	K-6769	11.65
Ford V-8	1697695	K-7838	46.25
Ford-4	LB10378	K-6768	11.65
Ford-4	A287871	2Y8393	3.75
Chevrolet-6	T4648696	K-6766	76.85
Ford-4	AA4778199	K-6765	11.80
Homemade	DMV844387	76026	3.20
Ford V-8	18-1984288	1Y9493	6.25
Ford V-8	18-2003574	2Y8394	6.25
Dodge-6	T12-9416	7Y537	6.15
Ford V-8	1655069	2Y8396	6.25
Ford V-8	1294772	PC04133	14.25
Chevrolet-6	K4831949	PCK6388	14.15
[fol. 8]			
Dodge-4	A525823	2Y7141	3.35
Ford-4	AA3827503	K6925	12.25
Ford V-8	18-1294156	6Y6552	6.25
Ford V-8	18-1649707	2Y8395	6.25
International-6	H033321	K2192	14.15
Terraplane-6	65611	2X7142	6.15

#### IV

That the said Ray Ingels as such Director and the said Howard E. Deems as such Registrar of Motor Vehicles have demanded of and from the bankruptcy estate herein all of the aforesaid penalties in addition to the proper 1937 tax herein and that the said penalties herein assessed are not proper claims against said bankrupt estate by reason of Section 57-J of the Bankruptcy Act.

Wherefore, your Petitioner prays that an Order to Show Cause issue out of this Court requiring said Ray Ingels, Director of Motor Vehicles of the State of California, and

the said Howard E. Deems, the Registrar of Motor Vehicles of the State of California, and each of them, to appear before this Court and show cause why the penalties assessed against said motor vehicles should not be set aside, and why the 1937 license plates upon said motor vehicles should not be issued and delivered to your petitioner upon the payment of the proper fees owing thereon exclusive of such penalties, and why such other and further orders should not be made in the premises as to the Court may seem meet and proper.

L. Boteler, Petitioner. David Schwartz, Attorney for Petitioner.

[fol. 9] *Duly sworn to by L. Boteler. Jurat omitted in printing.*

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—Filed March 6, 1937

Upon reading and filing the verified Petition of L. Boteler, Trustee herein, and good cause appearing therefor,

It is Ordered that Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, appear before this Court, at its Courtrooms located at Suite 611 H. W. Hellman Building, 354 South Spring Street, County of Los Angeles, State of California, on the 15th day of March, 1937, at the hour of 10 o'clock A. M. of said day, and then and there to show cause, if any it has, why an order should not be made setting aside the penalties assessed against said motor vehicles described in said petition and why an order should not be made requiring the issuance and delivery of the 1937 license plates upon said motor vehicles, and also to show cause why such other and further order should not be made in the premises as to the Court shall appear meet and proper.

It is Further Ordered that a copy of this Order to Show Cause together with a copy of said Petition be served upon Ray Ingels, Director of Motor Vehicles, and Howard E. Deems, Registrar of Motor Vehicles at least five (5) days before the date set for the hearing hereof.

Done in open Court this 6th day of March, 1937.

Ernest R. Utley, Referee.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

AMENDED PETITION FOR ORDER SETTING ASIDE PENALTIES  
AGAINST BANKRUPT—Filed April 8, 1937

To the Honorable Ernest R. Utley, Referee in Bankruptcy:

The amended Petition of L. Boteler, respectfully shows:

I

That your Petitioner is the duly qualified and acting Trustee in Bankruptcy of the above entitled bankrupt and that as such Trustee is now and was in possession of all of the assets of said bankrupt and particularly the personal property hereinafter described.

II

That at all times mentioned herein, Ray Ingels was and still is the Director of the Department of Motor Vehicles of the State of California and Howard E. Deems was and still is the Registrar of Motor Vehicles of the State of California.

III

That heretofore your petitioner has tendered and offered to pay to the Department of Motor Vehicles of and for the State of California, the proper vehicle license and registration fees for the year 1937 upon all of the motor vehicles hereinafter described and that the said Ray Ingels as such Director and the said Howard E. Deems as such Registrar of Motor Vehicles, and each of them, have refused and still refuse to issue the 1937 license upon said motor vehicles to [fol. 12] your petitioner as such Trustee in Bankruptcy unless your petitioner pays in addition to the usual and proper fees heretofore mentioned and tendered, the penalties assessed against such motor vehicles and hereinafter enumerated, namely, the following:

Description of Vehicle	Engine Number	1936 License	Penalty
Ford V-8	18-800655	2X7140	\$6.35
Ford-4	AA12550	K-6764	11.55
Ford V-8	1245685	K-6773	14.25
Ford V-8	18-725243	K-6770	13.25
Ford-4	AA4078994	K-6771	12.00
Ford-4	AA1958177	K-6772	11.70
Ford-4	AAB5057502	K-6767	12.25
Ford-4	AA3303515	K-6769	11.65
Ford V-8	1697695	K-7838	46.25
Ford-4	LB10378	K-6768	11.65
Ford-4	A287871	2Y8393	3.75
Chevrolet-6	T4648696	K-6766	76.85
Ford-4	AA4778199	K-6765	11.80
Homemade	DMV844687	76026	3.20
Ford V-8	18-1984288	1Y9493	6.25
Ford V-8	18-2003574	2Y8394	6.25
Dodge-6	T12-9416	7Y537	6.15
Ford V-8	1655069	2Y8396	6.25
Ford V-8	1294772	PC04133	14.25
Chevrolet-6	K4831949	PCK6388	14.15
Dodge-4	A525823	2Y7141	3.35
Ford-4	AA3827503	K6925	12.25
Ford V-8	18-1294156	6Y6552	6.25
Ford V-8	18-1649707	2Y8395	6.25
International-6	H033321	K2192	14.15
Terraplane-6	65611	2X7142	6.15

[fol. 13]

## IV

That the said Ray Ingels as Director and the said Howard E. Deems as such Registrar of Motor Vehicles have demanded of and from the bankruptcy estate herein all of the aforesaid penalties in addition to the proper 1937 tax herein and that the said penalties herein assessed are not proper claims against said bankrupt estate by reason of Section 57-J of the Bankruptcy Act.

## V

That your petitioner has heretofore sold, pursuant to the order of this court, a number of the motor vehicles aforesaid and that he cannot deliver clear title to said motor vehicles for the reasons heretofore alleged; that as to the motor vehicles still unsold, your petitioner herein is unable to sell the same unless the penalties assessed against said motor vehicles are set aside; that the Motor Vehicle Department of the State of California claims a lien upon all of said motor vehicles hereinbefore described and threatens to enforce



said liens and take possession thereof and sell the same to satisfy said liens pursuant to Section 379 of the Vehicle Code of the State of California and as further provided by Chapter 6 of Statutes of 1937.

## VI

That under and by virtue of the provisions of the Bankruptcy Act and other laws pertaining to the collection of a tax and the filing of tax claims, the said Ray Ingels, Director of Motor Vehicles and Howard E. Deems as Registrar of Motor Vehicles and the Motor Vehicle Department are not [fol. 14] barred by the six months period from asserting claims for taxes after said date; that it is practically impossible for the trustee herein to ascertain with certainty the correctness of the tax claims made by the Motor Vehicle Department against said motor vehicles and the bankrupt estate herein; that the trustee herein respectfully petitions for the protection of this court and the bankruptcy estate herein by having a bar order issued herein barring said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles and the Motor Vehicle Department from asserting any liens upon said motor vehicles after a certain date herein to be fixed by this court and that it is to the interest of all parties concerned in this estate that the Motor Vehicle Department, Ray Ingels, Director of Motor Vehicles, and Howard E. Deems, Registrar of Motor Vehicles be required to forthwith file such claims as they assert against this estate so that said estate may be expeditiously administered and closed promptly at the end of the six month period for filing claims.

Wherefore, your Petitioner prays

1. That an Order to Show Cause issue out of this Court requiring said Ray Ingels, Director of Motor Vehicles of the State of California, and the said Howard E. Deems, the Registrar of Motor Vehicles of the State of California, and each of them, to appear before this Court and show cause why the penalties assessed against said motor vehicles should not be set aside, and why the 1937 license plates upon [fol. 15] said motor vehicles should not be issued and delivered to your petitioner upon the payment of the proper fees owing thereon exclusive of such penalties.

2. That the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles, and the

Motor Vehicle Department, and each of them be required to forthwith file such claims as they assert against this estate and the motor vehicles hereinbefore described on or before a certain date to be set by this court, and upon their failure to file such claims that they be forever barred from asserting such claim or claims against this estate or against the motor vehicles hereinbefore described or against the trustee herein either in his official capacity as such trustee or individually.

3. That an order be made authorizing the trustee herein to sell said motor vehicles free and clear of any and all liens claimed by the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems Registrar of Motor Vehicles and the Motor Vehicle Department against all of said motor vehicles upon payment of registration & license fees, without the penalties.

4. For such other and further orders as the Court may seem meet and proper in the premises.

L. Boteler, Petitioner; David Schwartz, Attorney for Petitioner.

[fol. 16] *Duly sworn to by L. Boteler, jurat omitted in printing.*

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

AMENDED ORDER TO SHOW CAUSE—Filed April 8, 1937

Upon reading and filing the amended petition of L. Boteler, Trustee herein, and good cause appearing therefor:

It is Ordered that Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, appear before this Court, at its courtrooms located at Suite 611 H. W. Hellman Building, 354 South Spring Street, County of Los Angeles, State of California on the 13th day of April, 1937 at the hour of 2 o'clock P. M. of said day and then and there to show cause, if any it has, why an order should not be made setting aside the penalties assessed against said motor vehicles described in said petition and why an order should



not be made requiring the issuance and delivery of the 1937 license plates upon said motor vehicles.

It is Further Ordered, that said Ray Ingels, Director of Motor Vehicles and said Howard E. Deems, Registrar of Motor Vehicles, then and there show cause, if any it has, why they and each of them should not be required to forthwith file such claims as they assert against the estate herein and the motor vehicles described in said petition and upon their failure to file such claims why they should not be forever barred from asserting such claim or claims against this [fol. 18] estate or against the motor vehicles described in said petition or against the trustee herein either in his official capacity as such trustee or individually.

It is Further Ordered, that said Ray Ingels, Director of Motor Vehicles and said Howard E. Deems, Registrar of Motor Vehicles then and there show cause, if any it has, why an order should not be made authorizing the trustee herein to sell said motor vehicles free and clear of any and all liens claimed by the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles and the Motor Vehicle Department against said motor vehicles, and also to show cause why such other and further order should not be made in the premises as to the Court shall appear meet and proper.

It is Further Ordered that a copy of this Amended Order to Show Cause together with a copy of said amended Petition be served upon Ray Ingels, Director of Motor Vehicles, and Howard E. Deems, Registrar of Motor Vehicles at least three (3) days before the date set for the hearing hereof.

Done in open court this 8 day of April, 1937.

Ernest R. Utley, Referee.

[File endorsement omitted.]

---

[fol. 19] IN UNITED STATES DISTRICT COURT

#### OPINION OF REFEREE

The questions here to be determined involve the right of the State of California to collect from this bankruptcy estate the penalties provided for in Section 378 of the Vehicle Code of the State of California under the facts and circumstances hereinafter set forth, upon twenty-seven motor vehicles.

On the 16th day of September, 1936, the above named debtor filed its petition under Section 77b of the Bankruptcy Act as amended and on the same day, pursuant to said petition, the Court appointed a temporary trustee with authority to operate the business of the debtor, who was later by order of the Court, made permanent trustee and who as such trustee operated the creamery business of the debtor until the election and qualification of the present trustee, L. Boteler, on January 20, 1937.

The business of the debtor was operated during the above mentioned time at a loss and on December 10, 1936, a petition was filed seeking an order directing the trustee to liquidate the estate of said debtor and on December 22, 1936, such a liquidation was ordered and the case referred to the undersigned Referee for further administration, pursuant to the provisions of Section 77b of the Bankruptcy Act.

On January 20, 1937, following notice duly and regularly given to the creditors of the above named debtor, the present trustee herein, L. Boteler, was appointed as trustee and immediately thereafter duly qualified and took possession of the assets of the debtor including the trucks and automobiles hereinafter referred to.

[fol. 20] As heretofore pointed out, the business had operated under the first trustee at a loss and when the present trustee was duly qualified and took possession of the assets of the debtor, he found himself in possession of certain milk and ice cream routes which he considered valuable assets if the same could be held intact until a sale thereof could be consummated, the trustee realizing at the time that the value of these assets would be ruined if he failed to make the usual deliveries of milk and ice cream until such time as he could consummate a sale. The trustee found himself in possession of sufficient motor vehicles to make said deliveries but with absolutely no funds to purchase the 1937 license plates for said automobiles or to purchase milk and other necessary supplies and labor for the temporary operation of said routes. Rather than sacrifice the value which would be derived from the sale of said milk and ice cream routes, the trustee issued checks against said estate for the payment of milk and other necessary supplies and labor and cashed said checks out of his own personal funds, holding them until he was able to sell sufficient assets of the estate to take care of the checks so issued. The records disclose that the trustee lost no time in advertising and bringing on

for sale and confirmation of sale all the assets of the estate. When the return of sale came on for hearing, to wit: February 25, 1937, the trustee offered all of said assets for sale, as a whole and in parcels including the milk and ice cream routes, but notwithstanding the fact that there were numerous interested bidders in the Court Room who bid for said property, there were no satisfactory bids offered for the same as a whole. The Trustee was then ordered to sell at private sale for a value in excess of the amount bid and at [fol. 21] a value in excess of 75% of the appraised value of said property, making his return of sale in open Court for confirmation and giving interested bidders an opportunity to raise the proposed bid before confirmation of sale. The first property sold in this estate was sold on February 25, 1937, for the sum of \$8260.00 which included the milk and ice cream routes together with milk bottles, milk cases, ice cream cabinets, compressors, etc. There was no attempt to operate the business after the consummation of the sale of these routes. In the operation of these routes, it was necessary for the trustee to use the motor vehicles in question upon the public highways of the State of California from January 20, 1937, to February 28, 1937, the date of the final consummation of said sale. In other words, the trustee operated said motor vehicles upon the public highways of the State of California for a period of twenty four days after February 4, 1937, without having first acquired the necessary licenses, etc.

On or about the 27th day of February, 1937, the trustee went to the Department of Motor Vehicles and the Registrar of Motor Vehicles and tendered the necessary funds and offered to pay the required fees pursuant to provisions of the Motor Vehicle Act not including penalties but said Department of Motor Vehicles refused to issue the necessary licenses and transfers unless the penalties as provided in Section 378 of the Vehicle Code of the State of California were also paid and the trustee refused to pay any of said penalties basing his refusal upon the provisions of Section 57J of the Bankruptcy Act as amended. On March 6, 1937, the trustee filed his petition seeking an order to show cause against Ray Ingels as Director of the Department of Motor [fol. 22] Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California and each of them to "show cause why the penalties assessed against said motor vehicles should not be set aside

and why the 1937 license plates upon said motor vehicles should not be issued and delivered to your petitioner upon the payment of the proper fees owing thereon exclusive of such penalties, and why such other and further orders should not be made in the premises as the Court may seem meet and proper", and on April 8, 1937, the trustee filed his amended petition wherein he seeks the following relief—

"Wherefore, your Petitioner prays

1. That an Order to Show Cause issue out of this Court requiring said Ray Ingels, Director of Motor Vehicles of the State of California, and the said Howard E. Deems, the Registrar of Motor Vehicles of the State of California, and each of them, to appear before this Court and show cause why the penalties assessed against said motor vehicles should not be set aside, and why the 1937 license plates upon said motor vehicles should not be issued and delivered to your petitioner upon the payment of the proper fees owing thereon exclusive of such penalties.

2. That the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles, and the Motor Vehicle Department, and each of them be required to forthwith file such claims as they assert against this estate and the motor vehicles hereinbefore described on or before a certain date to be set by this court, and upon their failure to file such claims that they be forever barred from asserting such claim or claims against this estate or against the motor [fol. 23] vehicles hereinbefore described or against the trustee herein either in his official capacity as such trustee or individually.

3. That an order be made authorizing the trustee herein to sell said motor vehicles free and clear of any and all liens claimed by the said Ray Ingels, Director of Motor Vehicles, Howard E. Deems, Registrar of Motor Vehicles, and the Motor Vehicle Department against all of said motor vehicles, upon payment of registration and license fees without the penalties.

4. For such other and further orders as the Court may seem meet and proper in the premises."

The Attorney General appeared specially upon the orders to show cause issued pursuant to said petitions, on behalf of said departments, and objected to the jurisdiction of the



Referee to hear and determine the various matters in question. Said objection was overruled however, without prejudice to respondent's right to renew said objection at the conclusion of the testimony. The trustee gave certain testimony and certain documentary testimony was offered including the files and records of said case; thereupon the Attorney General renewed his objection to the jurisdiction of said Referee and the matter was submitted upon briefs.

The first question with which we are concerned is the jurisdiction of a Referee in Bankruptcy to grant injunctive relief under the facts and circumstances here presented. Subdivision 3 of General Order No. 12, provides in part—

“Applications for a discharge, or for the confirmation of a composition where the proceeding is had under section 12 [fol. 24] of the Act, *or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee, or in proceedings under section 77 of the Act, to a special master, to ascertain and report the facts* . . .” (Italics ours.)

Therefore, it is plain that if the trustee is seeking injunctive relief he must first apply to a Judge of the above entitled Court and the Judge will either hear the matter or refer same to a Referee as provided in said general order. Otherwise, the Referee is without jurisdiction to grant injunctive relief against the State of California or any department thereof. Neither has the Referee the jurisdictional power to compel the above mentioned State departments to issue said licenses and transfers.

But the Referee does have power to grant a bar order against said departments of the State of California as prayed for in the second paragraph of the prayer of the amended petition and also has the power to grant the relief prayed for in paragraph 3 of the prayer of said amended petition.

Section 64a of the Bankruptcy Act as amended so provides.

In *Huffel v. Harkelrode, Treasurer*, 18 ABR (NS) 730, at pages 732-733, Justice Brandeis speaking for the Court, said

“Van Huffel admits that the decision of the bankruptcy court was erroneous in denying priority to the taxes, but

insists that it is *Res Judicata*. The treasurer contends that [fol. 25] the judgment of the bankruptcy court authorizing and confirming the sale free from the tax lien is a nullity, because the court was without power to sell property of the bankrupt free from the existing lien for taxes; and also because it did not acquire jurisdiction over the state in that proceeding. First. The present Bankruptcy Act (July 1, 1898, 30 Stat. 544, c. 541), unlike the Act of 1867, contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by the federal courts sitting in equity when ordering sales by receivers or on foreclosure. *First National Bank v. Shedd*, 121 U. S. 74, 7 S. Ct. 807, 30 L. Ed. 877; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 9 S. Ct. 781, 33 L. Ed. 178.

The lower federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court and the duty imposed by section 2 of the Bankruptcy Act to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto.

No good reason is suggested why liens for state taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the Court express authority to determine "the amount or legality" of any tax. To transfer the lien from the property to the proceeds of its sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the [fol. 26] lien created by the state law must yield to the requirements of bankruptcy administration. Compare *International Shoe Co. v. Pinkus*, 278 U. S. 261, 13 Am. B. R. (N. S.) 108, 49 S. Ct. 108, 73 L. Ed. 318; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, 17 Am. B. R. (N. S.) 273, 51 S. Ct. 270, 75 L. Ed. 645; *Straton v. New*, 283 U. S. 318, 17 Am. B. R. (N. S.) 630, 51 S. Ct. 465, 75 L. Ed. 1060.

In many of the cases in the lower federal courts the order of sale entered was broad enough to authorize a sale free from tax liens as well as from others; and in some of them it appears affirmatively that liens for taxes were treated as discharged by the order. No case has been found in which

the power to sell free from the lien of state taxes was denied."

See also *In re Benson-Beckmann Paint Co., Inc.*, 15 ABR (N.S.) page 343.

*In re General Film Corporation*, 48 ABR, page 149.

*In re Florence Commercial Company*,

*George E. Truman, et al., v. Walter J. Thalheimer*, Trustee,

10 ABR (N.S.) page 284.

The next question involves the right of the State of California to charge a penalty under and pursuant to the provisions of the Motor Vehicle Act. Section 378 of the Vehicle Code of the State of California (1935) provides—

**"When Fees Delinquent. Penalties.**

(a) Whenever any vehicle is operated upon any highway of this State without the registration fee having first been paid as required by this code, such fee is delinquent.

[fol. 27] (b) A penalty shall be added upon any application for annual renewal of registration made on or after February 5 unless the vehicle has not been operated on the highways since the expiration date.

(c) If any other fee is not paid within thirty days after the same becomes delinquent a penalty shall be added thereto.

(d) In every event the penalty shall be equal to the fee and shall be collected therewith.

and Section 379 of said act provides—

**"Seizure and Sale of Vehicle.** (a) Every registration or transfer fee and any penalty added thereto, from the date the same become due, constitute a lien upon the vehicle for which due.

(b) The department shall collect such fee and any penalty by seizure of such vehicle from the person or persons in possession thereof, if any, and by the sale of such vehicle. The seizure and sale herein authorized shall be conducted and carried out by the department in the same manner as is provided by law for the seizure and sale of personal



property by the assessor for the collection of taxes due on personal property."

Therefore, there can be no question of the State's right to charge the proper penalties under the facts here, unless there is some provision in the Bankruptcy Act which will prevent it. The Ninth Circuit Court of Appeals in holding that a receiver in equity may be charged with penalties said in the case of the State of California v. Hiséy, 84 Fed. (2d) 802 at page 805—

[fol. 28] "The trial court disallowed the penalty of 10 per cent, for the nonpayment of the tax when due on the theory that it accrued after the receiver had taken possession of the property. We cannot see that the appointment of a receiver by a court of equity has any effect upon the right of the state of California to collect penalties for unpaid taxes. If the receiver had funds in his possession with which to pay the tax and failed to do so, thus incurring a penalty, no doubt he would be responsible to the estate in his custody for the payment of this penalty incurred because of his neglect, but this liability of the receiver would not relieve the property in his custody from the lien imposed by law. Receivers have been compelled in numerous cases to pay penalties for the nonpayment of taxes which accrued subsequent to their appointment. First Nat. Bank of Houston v. Ewing (C. C. A. 5) 103 F. 168; Bright v. State of Arkansas (C. C. A. 8) 249 F. 950; Spencer v. Babylon R. R. Co. (C. C. A.) 250 F. 24; McFarland v. Hurley (C. C. A. 5) 286 F. 365; Northern Finance Corp. v. Byrnes (C. C. A.) 5 F. (2d) 11. This court has so ruled. Coy v. Title Guarantee & Trust (C. C. A. 9) 220 F. 90 L. R. A. 1915E, 211. If the penalty, as well as the tax, is a lien upon the property in the hands of a receiver, as the statutes of California provide, it is difficult to see how the payment of the penalty can be differentiated from the payment of the lien for the tax. We can see no distinction. The penalty is a part of the tax. State of Kansas v. Bowker, 4 Kan. 114, Kansas P. Ry. Co. v. Amrine, 10 Kan. 318; Village of Westby v. Bekkedal, 172 Wis. 114, 178 N. W. 451; City of Harrisburg v. Guiles, 192 Pa. 191, 44 A. 48; Appeal of City of Titusville, 108 Pa. 600. If the decision of the Circuit Court of Appeals of the Third Circuit in Mc-[fol. 29] Cormick v. Puritan Coal Min. Co., 41 F. (2d)

213, is contrary to this line of authorities, as it seems to be, we cannot follow it."

The rule announced in the case of the State of California v. Hisey holding a receiver responsible where the penalties accrued due to his neglect does not apply here for as must be seen from the facts in this case, the Trustee had no funds with which to pay said fees prior to the sale of the property in question, and was not guilty of neglect. The only provision of law of which I am aware which might change the situation in the case now before us (a bankruptcy case) from the ruling announced by the Court in the case of the State of California v. Hisey, (an equity receivership case) above cited, is Section 57 J of the Bankruptcy Act which reads—

"Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law".

It is admitted by the Attorney General that if the State files a claim in this bankruptcy proceeding, it is precluded by Section 57 J of the Bankruptcy Act from collecting any penalties for in his brief filed herein, he says—

"The State officers herein do not, of course, contend that the penalties in question are an allowable claim against the estate in Bankruptcy. Section 77-j of the Bankruptcy Act specifically provides that such penalties "shall not be allowed". However, this does not mean that the penalties assessed pursuant to law are not a valid obligation [fol. 30] of the tax debtor. It merely means that a claim for the penalties cannot be allowed and paid as such through the bankruptcy estate from the general assets in the said estate. But if said penalties can be collected other than through the bankruptcy estate, there is nothing in the Bankruptcy Act or in any decision to the effect that such penalties do not constitute a valid obligation. And in so far as the penalties may constitute a lien upon property in the bankruptcy estate, such a lien is not affected by the provisions of the Bankruptcy Act. If, then, the Trustee sells the property free and clear of liens, the bankruptcy court

must recognize the lien on the proceeds of sale and direct the satisfaction of said lien therefrom. If the property is not sold free and clear of liens, then, of course, the lien still exists upon the property and the bankruptcy estate is no longer interested therein, and the State is free to pursue any remedies it may have for the enforcement of the obligation as a lien upon the property. The mere fact that an obligation is not an allowable claim under the Bankruptcy Act does not affect the validity of a statutory lien therefor, nor the right of the obligee to the satisfaction of the obligation as a lien upon the property in question." (undoubtedly when the Attorney General refers to Section 77 J, he intended 57 J of the Bankruptcy Act)

Just how these penalties can be paid unless paid from the "general assets in the estate" has not been satisfactorily explained.

[fol. 31] The Attorney General also relies upon the Act of Congress of June 18, 1934, which provides—

"Be it enacted by the Senate, and House of Representatives of the United States of America in Congress assembled, That any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after the enactment of this Act, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: Provided, however, That nothing in this Act contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to the approval of this Act, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same."

But it seems that his contentions are answered by the decision of the Court in the case of *In re Messenger's Merchants Lunch Rooms, Inc.* (85 Fed. (2d) 1002) the Court, in speaking of penalties accruing after adjudication in bankruptcy and interpreting the meaning of Section 57

J of the Bankruptcy Act and the Act of Congress of June 18, 1934, said at page 1005—

“(5, 6) Appellants sought to recover penalties of 25 per cent upon the taxes allowed. Section 57j of the Bankruptcy Act (11 U. S. C. A. § 93 (j) provides that debts owing to a state as a penalty shall not be allowed, except for the amount of the pecuniary loss and interest. Following this section, it has been held that penalties are not even provable in bankruptcy, but that claims can be allowed only for the amount of the pecuniary loss. In re York Silk Mfg. Co. (D. C.) 188 F. 735, affirmed *Pennsylvania v. York Silk Mfg. Co.* (C. C. A.) 192 F. 81, appeal dismissed 232 U. S. 718, 34 S. Ct. 601, 58 L. Ed. 813, and certiorari denied; 232 U. S. 724, 34 S. Ct. 602, 58 L. Ed. 815; *People of State of New York v. Jersawit*, 263 U. S. 493, 44 S. Ct. 167, 68 L. Ed. 405; *United States v. Birmingham Trust Co.* (C. C. A.) 258 F. 562. Consequently, the claim for penalties was properly disallowed.

It is insisted, however, that the act of June 18, 1934, subjecting receivers in bankruptcy to liability for the occupational tax should be so construed as to eliminate the prohibition against recovery of penalties provided in section 57j. The language of the act does not support this contention. It applies only to taxes not to penalties. We are not justified in extending its purview.”

unless it be for the fact that in the Illinois case there had been a claim filed. It will be noted that in the Illinois case, as here, the Trustee was not operating the business with the thought of making a profit and conducting the business, but as a step in the liquidation of the estate.

When enacting Section 57 J of the Bankruptcy Act, I think it is clear that Congress intended to include all debts owing to the United States, a state, etc., as a penalty or forfeiture regardless of whether there was a claim filed in the bankruptcy estate or not. Otherwise, there would be numerous opportunities for a governmental agency to avoid and get around the express provisions of said section of the Bankruptcy Act. It is also interesting to note that every other subsection of Section 57 of the Bankruptcy Act [fol. 33] deals with the filing and allowance of claims in the bankrupt estates except subsection 57 J of the Act and instead of this subsection referring to claims, it says “debts



owing to the United States, a state . . . as a penalty or forfeiture shall not be allowed . . . , and Division 1' of Section 1 of the Bankruptcy Act in defining the word 'debt' says "'debt' shall include any debt, demand, or claim provable in bankruptcy". See also Section 17 of the Bankruptcy Act. It is plain that Section 57 J of the Bankruptcy Act refers to debts and not to claims filed in a bankruptcy estate and I am not permitted to give it a narrower interpretation. Therefore, the only conclusion which I am able to come to is that the Department of the State of California above mentioned are not entitled to collect the penalties in question.

The Attorney General seems to take for granted that the State of California has a lien upon the automobiles in question under and by virtue of the section of the Motor Vehicle Act above quoted. This probably would be true had a lien accrued prior to adjudication in bankruptcy but even then the Referee would have jurisdiction to pass upon the validity and amount of said liens. (See the case of *In re Huffel v. Harkelrode*, Treasurer, 18 ABR (N. S.) 730 above cited). But can a lien attach to property in the hands of a trustee in bankruptcy and after adjudication? It will be observed that there was an order of liquidation in this case on December 22, 1936, which was several days before the 1937 fees and licenses in question were due and considerably more than a month before any penalties under and by virtue of the Motor Vehicle Act could attach. Therefore, before the State of California's lien, if any, could attach, the [fol. 34] automobiles in question were in *Custodia Legis*. Section 1449, page 1167, Gilbert's *Collier on Bankruptcy*, Third Edition, says in part—

"Time of Vesting—The title of the bankrupt vests in the trustee "as of the date he was adjudicated a bankrupt," but upon thus vesting relates back to the time of the filing of the petition. While it is true that by subsection a the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition, the estate being considered as *In Custodia Legis* from that time. Therefore, for the purpose of fixing priority as between a trustee in bankruptcy and adversely claiming lien holders the time of

filing the petition is the vital date, and a lien invalid on that date cannot be perfected before adjudication so as to make it valid against the trustee”.

and section 1450 of Gilbert's Collier on Bankruptcy, Third Edition, at page 1169, says in part—

“Title pending appointment of trustee.—In General.—It follows that, under the present law, the legal title to property remains in the bankrupt to the date of the appointment of the trustee, but he becomes a trustee thereof for all the creditors, *and no permanent lien can be acquired upon the property in the interim*, nor can the bankrupt effect any valid transfer of the property, except possibly for full value, in the ordinary course of business. \* \* \*” (Italics ours.)

[fol. 35] In the case of Lazarus, et al., v. Ezra P. Prentice, et al., 32 A. B. R. 559, at page 561, the Supreme Court said:

“The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts, wherever situated, into Custodia Legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law.”

See also Volume 5, Remington on Bankruptcy and notes, page 453 thereof.

I am not unmindful of the language used by the 9th Circuit Court of Appeals in the Hisey case above cited wherein it said—“but this liability of the receiver would not relieve the property in his custody from the lien imposed by law”, but it was apparent that the question of the right of the state to a lien after adjudication was not before this court in this case.

I am therefore of the opinion that the State does not have a valid lien under the facts as presented in this case upon the automobiles in question, and more especially since no penalties can be allowed in bankruptcy, the State could not have a lien upon the automobiles in question for the amount of penalties claimed.

The objection of the State of California to the jurisdiction of the Referee in so far as injunctive relief is concerned

[fol. 36] will be sustained without prejudice to the right of the trustee to apply to the Federal Court for any injunctive relief which he feels is appropriate under the provisions of the Bankruptcy Act and Subdivision 3 of General Order 12.

The prayer of the Trustee in seeking a bar order against the Director of the Department of Motor Vehicles and Registrar of Motor Vehicles is granted and said Departments are given thirty days within which to file any claims which they may have or assert against this estate or be forever barred from thereafter asserting same.

There are ample funds in said estate to pay any and all claims which the State of California may file. As herein pointed out, the Department of the State of California above mentioned, cannot successfully assert a lien after the order of liquidation and adjudication in bankruptcy and more especially for the penalties claimed to be due. The trustee is authorized and directed to sell said motor vehicles in question, which are described in his petition and amended petition herein, free and clear of any and all liens claimed by the Director of the Department of Motor Vehicles and the Registrar of Motor Vehicles of the State of California. Counsel for the trustee is directed to prepare appropriate findings and an order in accordance with this opinion.

Dated May 25th, 1937.

Ernest R. Utley, Referee in Bankruptcy.

[fol. 37] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Bankruptcy. No. 28563-C

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor

**Findings of Fact and Conclusions of Law and Order—**

Filed June 14, 1937

The above entitled matter came on regularly for hearing before Honorable Ernest R. Utley, Referee in Bankruptcy herein on a petition filed by L. Boteler, Trustee in Bankruptcy herein for an order to show cause requiring Ray Ingels, Director of Motor Vehicles of the State of Cali-



fornia, and Howard E. Deems, Registrar of Motor Vehicles of the State of California to show cause why the penalties assessed against certain motor vehicles described in said petition should not be set aside, and further requiring the respondents in said petition to show cause why the 1937 license plates upon said motor vehicles should not be issued and delivered to said Trustee in Bankruptcy upon the payment of the proper fees exclusive of the penalties. The order to show cause upon said petition was duly issued and made returnable on the 15th day of March, 1937 at 10 o'clock A. M. of said date.

Thereafter, to-wit, on the 8th day of April, 1937, the Trustee in Bankruptcy herein filed an amended petition praying that an order to show cause issue out of this court requiring said Ray Ingels, Director of Motor Vehicles of the State of California and said Howard E. Deems, Registrar of Motor Vehicles of the State of California to appear before this court and show cause why they should not be required to forthwith file such claims as they assert against said bankruptcy estate and the motor vehicles described in said petition and that upon their failure to file such claims that they be forever barred from asserting such claims or claims against said bankrupt estate and/or against the motor vehicles described in said petition and for a further order requiring that the said Ray Ingels, Director of Motor Vehicles of the State of California and said Howard E. Deems, Registrar of Motor Vehicles of the State of California further show cause why the said Trustee in Bankruptcy herein should not be authorized to sell said motor vehicles free and clear from any and all liens claimed by the Motor Vehicle Department of the State of California upon said vehicles.

An order to show cause was issued upon said petition as prayed for. Upon a hearing had before said Referee on the 13th day of April, 1937, at 2 o'clock p. m. of said date, the said Trustee in Bankruptcy appearing with his attorney, David Schwartz, and the respondents herein, Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California appearing through their attorneys, U. S. Webb, Attorney General and John O. Palestine, Deputy Attorney General, and evidence both oral and documentary was offered and received on behalf of the respective parties and the evidence being closed and the cause having been

submitted to this court for consideration and the court having fully considered the briefs filed by the respective parties herein and having duly considered the same, files its Findings of Fact and Conclusions of Law as follows:

[fol. 39]

## FINDINGS OF FACT

### I

The court finds that on the 16th day of September, 1936 the above named debtor filed its petition under Section 77b of the Bankruptcy Act as amended, and on the same day, pursuant to said petition, the court appointed John H. Chamness temporary trustee with authority to operate the business of the debtor and that said John H. Chamness as temporary trustee operated the creamery business of the debtor until the 20th day of January, 1937.

### II

The court further finds that the business of the debtor was operated at a loss and that on the 10th day of December, 1936, a petition was filed seeking an order to require the temporary trustee to liquidate the estate of said debtor, and that on the 22nd day of December, 1936 such a liquidation was ordered and the case referred to the Honorable Ernest R. Utley, as Referee for further administration pursuant to the provisions of Section 77b of the Bankruptcy Act.

### III

The court further finds that on the 20th day of January, 1937, following a notice duly and regularly given to the creditors of the above named debtor, the present trustee herein, L. Boteler, was appointed as trustee and immediately thereafter duly qualified and took possession of the assets of the debtor including the twenty-seven (27) trucks and automobiles described in the petition.

### IV

The court further finds that when the present trustee took possession of the assets of the debtor, he found him-  
[fol. 40] self in possession of certain milk and ice cream routes which he considered valuable assets providing the same could be held intact until a sale thereof could be consummated and the court further finds that the value of said

milk and ice cream routes would have been completely lost if said trustee had failed to make the usual deliveries of milk and ice cream until such a time as a sale could be consummated.

## V

The court further finds that the trustee herein had absolutely no funds in his possession between the date of his appointment on the 20th day of January, 1937 and the 27th day of February, 1937 with which to purchase the 1937 license plates for said motor vehicles and that in order to prevent the sacrifice and loss of said milk and ice cream routes, the said trustee issued checks against said estate for the payment of milk and other necessary supplies and labor and cashed said checks out of his personal funds, and held said checks until there was sufficient funds in said bankruptcy estate with which to pay the same.

## VI

The court further finds that the said trustee was diligent in advertising and bringing on for sale and confirmation of sale the assets of said estate and that the trustee herein operated said routes merely for the purpose of preserving the assets of the debtor until such time as a desirable sale could be consummated and that said trustee did not operate said motor vehicles for any purpose whatsoever except to preserve the value of the assets of said debtor as represented by said milk and ice cream routes, and that immediately upon the sale of said milk and ice cream [fol. 41] routes heretofore mentioned, the trustee herein tendered to the Department of Motor Vehicles of the State of California, and the Registrar of Motor Vehicles of the State of California, the required registration and license fees upon said motor vehicles as set out in said petition and that the said Department of Motor Vehicles and the Registrar of Motor Vehicles refused to accept the said registration and license fees unless the said trustee paid in addition thereto the penalties provided for by Section 378 of the Vehicle Code of the State of California.

## VII

The court further finds that at no time prior to the 27th day of February, 1937, did said trustee have funds with which to pay said registration and license fees owing upon

said motor vehicles and that the same condition existed from the date that the order of liquidation was made herein, to-wit, the 22nd day of December, 1936 to the date of the appointment of L. Boteler, the present trustee on the 20th day of January, 1937. That during the month of January, 1937 and up to the said 27th day of February, 1937, the trustee herein and his predecessor operated said vehicles upon the public highways of the State of California without the payment of any registration and license fees for said years.

### VIII

The court further finds that the estate of this debtor cannot be expeditiously administered and that the liquidation of said estate will be unduly prolonged unless the trustee herein is in a position to sell said motor vehicles free and clear of any liens or claims against said motor vehicles claimed by the said Ray Ingels, Director of Motor [fol. 42] Vehicles of the State of California, and the said Howard E. Deems, Registrar of Motor Vehicles of the State of California.

### IX

The court further finds that the trustee in bankruptcy herein is entitled to a bar order requiring the said Motor Vehicle Department of the State of California, and/or Ray Ingels, Director of Motor Vehicles of the State of California and the said Howard E. Deems, Registrar of Motor Vehicles of the State of California, and each of them, to file their claim or claims for the registration and license fees owing upon said motor vehicles or be forever barred from asserting any claim or claims for taxes and/or registration and license fees against said motor vehicles.

### CONCLUSIONS OF LAW

As Conclusions of Law, the court finds:

#### I

That the Motor Vehicle Department of the State of California is not entitled to collect the penalties of and from the estate of the debtor herein and that the Motor Vehicle Department of the State of California has no valid lien upon said motor vehicles described in said petition and has no claim against the estate of the debtor herein for any of such penalties.

## II

The court further finds that no valid lien attached against said motor vehicles after the 22nd day of December, 1936, being the date the order of liquidation was made herein.

[fol. 43]

## III

The court further finds that these proceedings as presented do not warrant the Referee herein to restrain the respondents herein nor to compel the said Ray Ingels, Director of Motor Vehicles of the State of California, and said Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the said Motor Vehicle Department of the State of California, to issue said license plates in view of the provisions of Subsection 3 of General Order 12.

## ORDER

In conformity with said Findings of Fact and Conclusions of Law, it is hereby ordered:

That any and all penalties assessed upon or claim against the motor vehicles described in said petition shall be and are hereby set aside and the said trustee herein is hereby ordered and directed to sell said motor vehicles free and clear of any and all claims or liens of the said Ray Ingels, Director of Motor Vehicles of the State of California and the said Howard E. Deems, Registrar of Motor Vehicles of the State of California and the said Motor Vehicle Department of the State of California.

It is further ordered, adjudged and decreed that the Motor Vehicle Department of the State of California and/or Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor [fol. 44] Vehicles of the State of California and each of them be and each of them are hereby ordered to file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days from the date of this order or be forever barred from asserting any claim or claims for taxes and/or registration or license fees against said motor vehicles and against this bankrupt estate or the trustee herein, either in his official capacity as such trustee or individually.



It is further ordered, adjudged and decreed that this order shall be without prejudice to the right of the trustee to apply to the Federal Court for any injunctive relief which he feels is appropriate under the provisions of the Bankruptcy Act and Subdivision 3 of the General Order 12.

Done in Open Court this 14th Day of June, 1937.

Ernest R. Utley, Referee.

Approved as to Form as Provided in Rule 44.

U. S. Webb, Attorney General, by John O. Palstine, Deputy Attorney General, Attorneys for Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW OF ORDER OF REFEREE IN BANKRUPTCY—  
Filed June 23, 1937

To the Honorable George Cosgrave, Judge of the United States District Court, Southern District of California, Central Division:

Your petitioners, the Motor Vehicle Department of the State of California, Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, by and through the Attorney General of said state, respectfully represent as follows:

## I

Prior to September 16, 1936, the above named debtor was engaged in the creamery business in the State of California. Amongst the assets of said debtor were certain milk and ice cream routes, and twenty seven automobiles and trucks used in the business of said debtor, and particularly in connection with the making of deliveries upon said milk and ice cream routes.

## II

On September 16, 1936, the petition of the above named debtor was filed in the above entitled District Court, pur-

suant to the provisions of Section 77-B of the Bankruptcy Act. On the same date, said petition was approved and John H. Chamness was appointed temporary trustee, with authority to operate the business of said debtor.

On September 23, 1936, pursuant to petition therefor duly filed by said temporary trustee, said District Court made [fol. 46] its Order granting said temporary trustee permission to issue Trustee's Certificates to the amount of \$10,000.00 to raise funds for the use of said temporary trustee in the continuance and operation of the business of said debtor.

On October 16, 1936, said temporary trustee filed a report with said District Court of his operations of said business during the first month of his trusteeship. Said report shows that said trustee had borrowed \$2,000.00 on the aforesaid certificates and that during said month his operation of said business had resulted in a loss of \$2865.00.

On December 22, 1936, pursuant to petition theretofore filed and an Order to Show Cause duly and regularly issued thereon, said District Court made its order directing the liquidation of the assets of the above named debtor and appointed said John H. Chamness as temporary trustee for the purpose of such liquidation but with the same powers as previously given said trustee with regard to the operation of the business of said debtor, and further ordered that the administration of said estate generally be and the same was thereby referred to Ernest R. Utley, Referee in Bankruptcy, for further administration pursuant to the provisions of Section 77-B of the Bankruptcy Act, as amended, and particularly with respect to subdivisions (c), (f) and (k) of said section.

On January 5, 1937, the schedule of assets and liabilities of said company was filed herein, showing assets of \$148,380.82 and liabilities of \$87,089.64, including said \$2,000.00 of Trustee's Certificates issued as hereinabove set forth.

[fol. 47] On January 20, 1937, pursuant to notice duly and regularly given to the creditors of the above named debtor, L. Boteler was appointed as trustee herein, and immediately thereafter duly qualified and took possession of the assets of the debtor. Continuously since said time said L. Boteler has been and now is the duly qualified and acting trustee of said estate.

## III

Continuously during the month of January, 1937, and to and including February 27, 1937, said temporary trustee and said trustee, respectively, in order to preserve the full value of the business of the debtor as a going concern pending liquidation, continued to operate the business of said debtor and to make the usual deliveries of milk and ice cream upon the aforesaid milk and ice cream routes of said debtor, and, in that connection, operated the aforesaid automobiles and trucks upon the public highways of the State of California. There thereby became due to the State of California as and for license and registration fees upon said vehicles for the year 1937, fees in the amount of \$410.90. Said fees were due and payable on or before February 4, 1937.

## IV

During the operation of the business of the debtor by the trustee, as aforesaid, he issued checks against the estate herein, for the purchase of milk and for the payment of labor and other expenses in connection with the operation of said milk and ice cream routes. When there were insufficient funds in said estate to pay said checks, said trustee cashed the same out of his own personal funds and held the checks until there were sufficient funds in the bankruptcy estate with which to pay the same. However, [fol. 48] he did not pay to the State of California the 1937 license fees upon said vehicles, in the amount of \$410.90 or at all, but allowed said fees to become delinquent, whereupon, on February 4, 1937, certain cash penalties were added thereto pursuant to the provisions of the California laws providing for said license and registration fees.

## V

On February 28, 1937, said referee herein made an order confirming the sale of the aforesaid milk and ice cream routes, together with milk bottles, milk cases, ice cream cabinets, compressors and other equipment for the sum of \$8260.00. This was the first property sold in said liquidation, and the trustee did not thereafter attempt to operate the business of the debtor.

## VI

On or about February 27, 1937, said trustee applied to the Department of Motor Vehicles of the State of California for the 1937 licenses upon the motor vehicles hereinabove referred to. Said Department of Motor Vehicles demanded the payment of both said fees and said penalties as a condition to the issuance of said 1937 licenses and the transfers requested by said trustee. Said trustee offered to pay said fees but refused to pay any of said penalties added thereto. The licenses and transfers were therefore denied said trustee.

## VII

On March 6, 1937, said trustee filed with said Referee a petition seeking an order to show cause against Ray Ingels as Director of the Department of Motor Vehicles of the State of California and Howard E. Deems, Registrar of [fol. 49] Motor Vehicles of the State of California, and each of them, "to show cause why the penalties assessed against said motor vehicles should not be set aside and why the 1937 license plates upon said motor vehicles should not be issued and delivered to said trustee upon the payment of the fees prescribed by law exclusive of said penalties." In behalf of said officers, the Attorney General of the State of California appeared specially upon said order to show cause issued pursuant to said petition, and objected to the jurisdiction of the Referee to hear and determine the various matters presented by said petition and order to show cause. Said objection was overruled without prejudice to respondents' right to renew said objection at the conclusion of the testimony. The trustee thereupon gave certain testimony, and documentary evidence was offered and received, including the files and records of the above entitled case. At said hearing, said trustee was asked for a statement of his receipts and disbursements as trustee from January 20, 1937, to February 4, 1937, inclusive, but said trustee did not have his records in this regard with him. It was therefore stipulated that said trustee might file with the Referee a statement of receipts and disbursements from January 20, 1937, to February 4, 1937, inclusive, and that such statement would be deemed a part of the evidence taken at said hearing. Thereupon said Attorney General renewed his objection to the jurisdiction of said Referee and the matter was submitted upon briefs.

## VIII

On April 8, 1937, said trustee filed with said Referee an amended petition seeking an order to show cause against the Department of Motor Vehicles of the State of California [fol. 50] and the aforesaid officers thereof, seeking, in addition to the relief prayed for in the aforesaid original petition, an order requiring said Department of Motor Vehicles and said officers thereof to "forthwith file such claims as they assert against this estate and the motor vehicles hereinbefore described on or before a date to be set by this Court, and upon their failure to file such claims that they be forever barred from asserting such claim or claims against this estate or against the motor vehicles hereinbefore described or against the said trustee herein in his official capacity as such trustee or individually," and seeking a further order authorizing said trustee to sell said motor vehicles free and clear of any and all liens claimed by said officers, "upon the payment of registration and license fees without the penalties." At the hearing duly and regularly held upon said order to show cause issued upon said amended petition, the matter was submitted upon the evidence theretofore introduced at the hearing upon said original petition as hereinabove set forth, and subject to the same objection by the Attorney General on behalf of said Department of Motor Vehicles and the officers thereof.

## IX

The Final Report of John H. Chamness as trustee upon the administration of the estate of the above named debtor from September 16, 1936; to January 19, 1937, inclusive, on file herein shows that the total operating loss resulting from the operation of the business of the debtor during said period amounted to \$9641.42. Said Report further shows, however, that from January 1, 1937, to January 19, 1937, inclusive, said trustee received \$10,169.86 in connection with his operation of the business of said debtor, as [fol. 51] aforesaid, and also shows the following disbursements by said trustee from January 1, 1937, to January 19, 1937, inclusive:

[For this statement see Report of John H. Chamnes, set out in full in this Transcript.]



## X

On May 4, 1937, said L. Boteler, trustee, filed his First Report and Account, with said Referee. Said Report and Account contains a statement of the receipts and disbursements of said trustee from January 20, 1937, to the date of said Report, and, particularly, shows the following receipts by said trustee from January 20, 1937, to February 4, 1937, inclusive:

Jan. 20	Cash on hand at time of taking charge of business	\$467.97
Jan. 20	Cash sales and collections	459.51
21	"	312.71
22	"	494.90
23	"	388.14
24	"	195.66
25	"	634.10
26	"	379.52
27	"	931.21
28	"	344.95
29	"	566.50
30	"	453.91
31	"	205.71
Feb. 1	"	732.21
2	"	389.48
3	"	466.71
4	"	476.72

[fol. 52] Said Report and Account further shows, particularly, the following disbursement by said trustee from January 21, 1937, to February 4, 1937, inclusive:

[For this statement see Report of L. Boteler, set out in full in this Transcript.]

## XI

On May 25, 1937, said Referee rendered and filed an opinion upon said matters theretofore submitted, as aforesaid, and directed counsel for said trustee to prepare findings in accordance with said opinion, denying certain of the relief prayed for by said petition and said amended petition, and granting certain other relief prayed for therein. Thereafter, on June 14, 1937, said Referee made and filed his findings of fact and conclusions of law. Particularly, said

referee found that "the trustee herein had absolutely no funds in his possession between the date of his appointment on the 20th day of January, 1937 and the 27th day of February, 1937 with which to purchase the 1937 license plates for said motor vehicles" (Findings, Paragraph V), and that "at no time prior to the 27th day of February, 1937, did said trustee have funds with which to pay said registration and license fees owing upon said motor vehicles and that the same condition existed from the date that the order of liquidation was made herein, to wit, the 22nd day of December, 1936 to the date of the appointment of L. Boteler, the present trustee on the 20th day of January, 1937." (Findings, Paragraph VII).

## XII

[fol. 53] Also on June 14, 1937, said referee made and entered his order pursuant to said findings and conclusions. By said order said Referee ordered that any and all penalties assessed upon or claimed against the aforesaid motor vehicles should be and were thereby set aside, and ordered and directed said trustee to sell said motor vehicles free and clear of any and all claims and liens of said Ray Ingels, Director of Motor Vehicles of the State of California, and of said Howard E. Deems, Registrar of Motor Vehicles of the State of California, and of said Motor Vehicle Department of the State of California, and further ordered, adjudged and decreed that said Motor Vehicle Department of the State of California and/or Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, Registrar of Motor Vehicles of the State of California, and each of them, be and they were thereby ordered to file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days from the date of said order or be forever barred from asserting any claim or claims for taxes and/or registration or license fees against said motor vehicles and against said bankrupt estate or the trustee therein, either in his official capacity as said trustee or individually. Said Referee declined, however, to make any order directing said Department or said officers to receive the principal of said fees in full payment of all sums owing said Department on said vehicles, and declined to enjoin said Department or said

officers from demanding the penalties prescribed by law as a condition to the registration or transfer of said vehicles in [fol. 54] the State of California in 1937, but ordered, adjudged and decreed that said order be without prejudice to the right of the trustee to apply to the federal court for any injunctive relief which said trustee might deem appropriate under the provisions of the Bankruptcy Act and subdivision 3 of General Order XII.

### XIII

Your petitioners respectfully urge, and each of them urges, that said Honorable Ernest R. Utley, Referee in Bankruptcy herein, erred and exceeded his jurisdiction in making his findings as aforesaid, and in granting any of the relief prayed for in said petition and said amended petition, and in making his order as hereinabove set forth, for the following reasons:

(a) That the finding of the referee that neither of the trustees herein had any funds with which to pay, on or before February 4, 1937, the fees in question, is contrary to the law, the evidence and records on file herein.

(b) That the finding of the referee that the trustee is entitled to a bar order requiring the State officers to file a claim for said fees or be forever barred from asserting any claim or claims for taxes and/or registration and license fees against said motor vehicles, is contrary to the law, the evidence and the records on file herein.

(c) That the conclusion of law of the referee that the Department of Motor Vehicles of the State of California has no claim against the estate herein is contrary to the law and the findings of fact.

(d) That the conclusion of law of the referee that said Department of Motor Vehicles is not entitled to collect said [fol. 55] penalties of and from the estate of the debtor herein is contrary to the law and the findings of fact.

(e) That the conclusion of law of the referee that said Department of Motor Vehicles has no valid lien upon the motor vehicles in question is contrary to the law and the findings of fact.

(f) That the order of the referee setting aside any and all penalties assessed upon or claimed against said motor

vehicles is in excess of the jurisdiction of said referee and is contrary to the law and the evidence and is not even warranted or supported by the referee's own conclusions of law.

(g) That the order of the referee directing the trustee herein to sell said motor vehicles free and clear of any and all claims or liens of said Department or of certain officers thereof is in excess of the jurisdiction of said referee and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

(h) That the order of the referee requiring said Department and said officers to "file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days" from the date of said order or be forever barred from asserting such claim or claims either against said vehicles or against this bankrupt estate or against the trustee herein individually or as such trustee, is in excess of the jurisdiction of said referee and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

[fol. 56] Wherefore, your petitioners, feeling aggrieved because of said order of the Honorable Ernest R. Utley, Referee in Bankruptcy herein, granting certain relief to the trustee as hereinabove set forth, pray and each of them prays that such order may be reviewed by said District Court as provided by law, and that said referee prepare his Certificate on Review for that purpose and file the same with said District Court.

Dated: June 22, 1937.

Motor Vehicle Department of the State of California, Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, Registrar of Motor Vehicles of the State of California, Petitioners. By U. S. Webb, Attorney General; by John O. Palstine, Deputy Attorney General, Attorneys for Petitioners.

[Endorsed:] Received copy of the within Petition this 23 day of June, 1937, David Schwartz,—E F Attorney for Trustee.

[File endorsement omitted.]

## [fol. 57] IN UNITED STATES DISTRICT COURT

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW—Filed  
July 12, 1937

To the Honorable Judges of the United States District Court:

I, Ernest R. Utley, Referee in Bankruptcy in and for said District, do hereby certify as follows:

That on March 6, 1937, the Trustee herein, L. Boteler, filed a petition for an order setting aside penalties against bankrupt. An order to show cause was entered thereon on March 6, 1937 directing Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California, to appear before said Referee on March 15, 1937, at 10:00 A. M. and show cause why the prayer of the Trustee should not be granted. The matter came on for hearing on March 15, 1937, and was submitted. On March 23, 1937, a brief was filed by David Schwartz, attorney for the trustee herein. On March 29, 1937, John O. Palestine, Deputy Attorney General, filed the reply brief of Ray Ingels, Director of Motor Vehicles of the State of California, and Howard E. Deems, Registrar of Motor Vehicles of the State of California. On March 30, 1937, a reply brief was filed on behalf of the Trustee. On April 8, 1937, the trustee filed an amended petition for an order setting aside penalties [fol. 58] against the bankrupt, and an amended order to show cause against Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles, was entered thereon and the hearing set for the 13th day of April, 1937 at 2 P. M. On March 9, 1937, supplemental memorandum of authorities was filed on behalf of the Trustee. On April 13th, 1937 the matter came on for hearing and was submitted on briefs.

On May 25th, I entered my opinion in said matter and on June 14th, 1937, Findings of Fact and Conclusions of Law and Order was entered, and on June 23, 1937, a petition for review of order of Referee in Bankruptcy was filed by Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of the State of California.

The question for determination is whether or not said order is a proper order.



For the information of the Court, I transmit herewith the following documents:

1. Petition of L. Boteler for order setting aside penalties against bankrupt.
2. Order to show cause.
3. Brief—Trustee.
- [fol. 59] 4. Reply Brief—Ray Ingels and Howard E. Deems.
5. Reply Brief—Trustee.
6. Amended petition for order setting aside penalties against bankrupt.
7. Amended order to show cause.
8. Supplemental memorandum of authorities—trustee.
9. Opinion.
10. Findings of Fact and Conclusions of Law and Order.
11. Petition for Review of order of Referee in Bankruptcy.

Dated: July 12, 1937.

Respectfully submitted, Ernest R. Utley, Referee in Bankruptcy.

[File endorsement omitted.]

---

[fol. 60] IN UNITED STATES DISTRICT COURT

REFeree's SUPPLEMENTAL CERTIFICATE ON PETITION FOR  
REVIEW—Filed July 30, 1937

To the Honorable Judges of the United States District Court:

I, Ernest R. Utley, Referee in Bankruptcy in and for said District, do hereby supplement the record heretofore certified in the above entitled proceeding, with the following additional documents:

1. Statement of evidence of proceeding had before the Referee on March 15, 1937.

2. Reporter's transcript of the evidence.
3. Report of John H. Chamness, temporary trustee, filed April 3, 1937.
4. Report of L. Boteler, trustee, filed May 4, 1937.

Reference is also made to the entire file, which will be transmitted to you upon request, which shows the dates on which the property in this estate was sold and the dates on which the trustee first came into possession of any funds which would have been in excess of the operating expenses of this business pending the sale.

July 30, 1937.

Respectfully submitted, Ernest R. Utley, Referee in Bankruptcy.

[File endorsement omitted.]

[fol. 61] IN UNITED STATES DISTRICT COURT

Present: The Honorable Geo. Cosgrave, District Judge.

No. 28,563-C. Bkey.

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor

ORDER—October 22, 1937

This matter having come before the Court on July 12, 1937, for hearing on order, filed June 26, 1937, directed to Ray Ingels, Director of Motor Vehicles, and Howard E. Deems, as Registrar of Motor Vehicles, etc. to show cause why you have not issued to petitioner as trustee 1937 license plates, certificates of ownership, etc. if you have not already done so, and having been argued by counsel and submitted on briefs to be filed 10 x 10 x 5, the Court, upon consideration thereof, now orders as follows:

Order to Show Cause is granted, and respondents are directed to issue license plates as prayed for and comply with the order. Exception is allowed to the respondents.

This matter also coming before the Court on September 7, 1937, for hearing on motion of L. Boteler, Trustee, for

hearing and determination of the Petition for Review of the order made by the Honorable Ernest R. Utley, on June 14, 1937, pursuant to notice filed August 19, 1937, and submitted on briefs, and said briefs having been filed and duly considered by the Court, the Court now orders as follows:

Petition for review of the Order of the Referee is denied and findings and Order of the Referee are confirmed. Exception is allowed to the Petitioners.

---

[fol. 62]      IN UNITED STATES DISTRICT COURT

STATEMENT OF EVIDENCE ON APPEAL—Filed January 19,  
1938

The above entitled case was submitted to the United States District Court pursuant to a petition for review of an Order of the Referee in Bankruptcy dated the 14th day of June, 1937, directing Ray Ingels, as Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of said State to file with said referee their claim for motor vehicle registration and license fees or be forever barred, and ordering certain vehicles sold free and clear of liens including any lien for said fees, without transferring such lien to the proceeds of such sale, and setting aside certain penalties added to said fees. The petition for review having been denied and the order of the referee confirmed, said Ray Ingels and said Howard E. Deems have duly petitioned for and been allowed an appeal from the order of said District Court.

For the purpose of completing the record in said cause for the purpose of said appeal, and to enable the parties to have the proceedings heretofore had and the findings, conclusions and orders entered herein reviewed on said appeal, it is hereby stipulated that the Court may and the Court does hereby certify that the following enumerated papers and documents, on file herein were certified to this Court by the referee in bankruptcy herein, and constitute the entire evidence herein:

[fol. 63] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 28563-C

In the Matter of RICHMAID CREAMERIES, INC., a Bankrupt

STATEMENT OF EVIDENCE AND PROCEEDINGS AT HEARING  
BEFORE REFEREE ON MARCH 15, 1937

At the hearing before the Referee on March 15, 1937, the following proceedings were had, and the following evidence taken and received:

"The Referee: Estate of the Richmaid Creameries," are you ready in that matter.

Mr. Schwartz: Mr. Boteler take the stand, please.

L. BOTELER, being first duly sworn testified as follows:

Mr. Palstine: Before any testimony is taken in the matter, on behalf of the persons named in the order, we object to the jurisdiction of this court to take any proceedings, pursuant to the petition or the order upon the ground that any order this court would make, would be to restrain the officers of the State of California from performing certain acts imposed upon them by the motor vehicle code. Presuming that the Bankruptcy Act is controlling, and they should not perform the duties imposed upon them by the Motor Vehicle Code, but restrained from performing those duties, that is not a matter which can be ordered by the referee. It is a matter either handled independently by mandamus, or—

[fol. 64] The Referee: You are raising the jurisdictional question to having the matter determined here?

Mr. Palstine: To the jurisdiction of the referee to determine the matter." (Tr. p. 1, ll. 3-26)

"The Referee: I will overrule the objection to the jurisdiction without prejudice to your right to renew your objection at the conclusion of the testimony. You may proceed with the testimony." (Tr. p. 7, ll. 14-18)

Thereupon, Mr. Boteler, having been called as a witness in behalf of said Trustee, and having been first duly sworn, testified as follows:

**Direct-examination:****(In response to questions by Mr. Schwartz)**

I qualified as Trustee in Bankruptcy in this estate on or about January 20th of this year. I have in my possession as such Trustee the motor vehicles described in the petition on file herein. Upon receipt of a letter from Deputy Registrar Bullock of the Motor Vehicle Department in Long Beach setting forth the details of the amount due as fees and penalties for the registration of said vehicles for the year 1937. I tendered to Mr. Bullock a cashier's check in the amount of \$410.90, which was the amount of the fees without penalties. The penalties amounted to \$348.20. Said tender was made after February 4, 1937, and after the date of said letter. (Said letter was thereupon admitted in evidence as Trustee's Exhibit No. 1, and is as follows:

[fol. 65]      **TRUSTEE'S EXHIBIT No. 1**

**“Frank F. Merriam**  
Governor

**Ray Ingels**  
Director

**(SEAL)****STATE OF CALIFORNIA****DIVISION OF REGISTRATION****OF THE****DEPARTMENT OF MOTOR VEHICLES****Russell Bevans, Deputy Director****Originating from****Long Beach Branch Office****855 Pacific Avenue****Feb. 20, 1937**

**Mr. L. Boetler, Trustee,**  
**Richmaid Creameries, Inc.,**  
**311 Garfield Building,**  
**Los Angeles, California.**

**Dear Sir:**

On December 15, 1936 your Mr. Wood deposited with this office applications for renewal of licenses on 26 vehicles, without fees accompanying same.



When these fees were computed this office notified Mr. Wood of the total amount required for 1937 renewals, then being \$410.90. Payment of these fees was not then made nor have they been paid to this date.

Mr. Wood now informs me that the Richmaid Creameries, Inc., are in bankruptcy and that you are the Trustee [fol. 66] in Bankruptcy, and requests me to communicate direct with you.

Since the required fees were not paid during the 1937 renewal period, which closed on Feb. 4, 1937 at midnight, we are required by law to collect penalties of 100% on the registration fees and 50% on the vehicle license fees; and since the ownership has apparently passed to another legal entity we must require the transfer of the ownership to you as Trustee in Bankruptcy on each vehicle, taking a \$1.00 fee for each vehicle.

The total fees now required in order to license these vehicles for 1937 are as follows:

Registration Fees & VL Fees .....	\$410.90
Regn. Fee Penalties & VLF .....	
Penalties .....	348.20
26 Transfers @ 1.00 .....	26.00
	<hr/>
TOTAL REQUIRED .....	\$785.10

In view of the fact that all these vehicles have been operated illegally since Feb. 4, 1937, you are urged to pay the required fees of \$785.10 and effect the transfers of ownership immediately. For this purpose all the certificates of ownership must be surrendered properly signed over to you as trustee.

Awaiting your prompt response.

Yours very truly, Howard E. Deems, Registrar of Vehicles. By Dana J. Bullock, Dana J. Bullock, Manager Long Beach Branch Office.

[fol. 67] Thereupon the following proceedings were had:

"Mr. Schwartz: Now, after you were appointed trustee, with reference to these trucks, what, if anything was done with them?

A. They were used only to that degree which was necessary following my appointment to bring out an order of liquidation of the assets of the estate.

Mr. Palestine: We object, it calls for a conclusion of the witness as to what was necessary, if he cares to state what he did, that is different.

The Referee: State what you did, Mr. Boteler:" (Tr. p. 12, ll. 13-24)

Whereupon said witness continued his testimony as follows:

After I was appointed Trustee I temporarily continued the operation of the business which was that of buying milk and cream from the distributors, the same as all the grocers do, and distributed to retailers and wholesalers in bottles and cans on numerous routes which the bankrupt was serving at the time of my appointment. I continued that from my appointment until February 28th, the date of the sale of said routes, at which time the Trustee discontinued further use of the trucks.

The reason for continuing the operation of and serving these routes until the date of the sale, was to the end that we could find a buyer; to find a buyer for the good will of the business. I knew that the routes would become valueless if we didn't continue them until they were sold. There were several retail markets and because they must have protection, they were protected thereby. The preservation of the [fol. 68] good will of the business until we found a customer was the general reason, the chief reason for operating the business. We did everything we could to expedite a sale of the routes. We didn't sit down and wait for somebody to come along. We did considerable advertising and finally consummated a sale on February 28th. The motor vehicles are still in my possession.

(In response to question by Referee:)

To my knowledge, they have not been used since the sale of the routes. There were two, the purchaser who bought the good will, operated two or three for a day or two after the sale was consummated until he could acquire his own equipment.

(In response to question by Mr. Schwartz:)

Outside of that they have not been used.

### Cross-examination.

(In response to questions by Mr. Palstine:)

I was not Receiver of the business from January 1st to January 20th, when I became Trustee. My testimony as to use of the motor vehicles between those dates would be hearsay, as I was not connected with the business until my appointment. I took possession of the business on January 20th. Since that time and until we sold the routes and equipment we carried on the business of the bankrupt, and in doing so, used the trucks and other automotive equipment described in Paragraph III of the Petition herein.

Other assets which came into my possession at the time I became Trustee were the real property, buildings, machinery and equipment and miscellaneous refrigeration equipment in the hands of the customers, which was scattered all over the cities of Long Beach, San Pedro and Wilmington.

I do not have before me an itemized detailed statement showing the cash I have handled since I became Trustee. I could prepare such a statement, but I might say with the thought of conveying to your mind what you seek to know, that the receipts when I was appointed and took possession on January 20th, were inadequate to purchase the requirements and pay cash and keep up with the pay roll. The outgo was approximately \$500.00 a day for emergencies until the latter part of the month of January, and the income was not enough to buy the requirements and keep up with the miscellaneous and incidental expenses. The incidental and miscellaneous expenses I refer to were the payroll, particularly, and buying supplies, such as service of the bottles, paying for the use of the bottles. If you are familiar with the dairy business you know how they operate these bottle exchanges. Every seller of milk delivers those bottles to the bottle exchange and they make certain changes and then you have to deliver them to a certain central point when they are picked up by the drivers. We paid the exchanges for that service, they were enormous.

The following proceedings were thereupon had:

“Mr. Palstine: Counsel, will you stipulate that the trustee will prepare a statement of his receipts and disbursements from the time of his appointment to and including February 4, 1937 and that it may then be introduced in lieu of his testimony on that point.

[fol. 70] Mr. Schwartz: It will unnecessarily encumber the record. He can explain the reasons why he didn't pay the license fees before he did offer to pay for them.

The Referee: I don't think your statement would do any harm and Mr. Boteler can prepare such a statement and file it.

Mr. Palstine: The same as your books here and we will be satisfied to accept his statement as an equivalent of his testimony." (Tr. p. 18, ll. 2-17.)

Said witness then continued his testimony on cross-examination as follows:

We will explain such a statement. I might say further that it became necessary myself, from my own funds to pay cash to employees for a week or two after I got in there because of the inadequate daily receipts to keep the pay-roll going and buy the necessary requirements. In other words, the reason for not paying this tax, one reason at least, was the inadequacy of money so to do.

I refused to pay the penalties of \$348.20, demanded by the Long Beach branch manager of the Department of Motor Vehicles of the State of California in their letter of February 20, 1930.

#### Re-direct examination.

(In response to questions by Mr. Schwartz:)

The only thing I refused to pay was the penalties assessed against the motor vehicles.

Thereupon the following proceedings were had:

"The Referee: Any further testimony, gentlemen, other than the statement which Mr. Boteler will prepare:

[fol. 71] Mr. Palstine: None on behalf of the respondents to the petition.

Mr. Schwartz: None, Your Honor.

The Referee: Have you anything further Mr. Schwartz?

Mr. Schwartz: No, but I have two or three cases I would like to cite.

The Referee: Since we have to take this matter under submission because of Mr. Boteler's statement, I would like to have it briefed, and it presents a very interesting point in law, and it certainly presents one which has not arisen

during my experience as a referee and it is one which might frequently arise in the future.

Mr. Palestine: Before the matter is submitted, I renew at this time my objection to the jurisdiction of this court and on that ground I move to strike all the testimony that has been received upon the assumption that there is jurisdiction.

The Referee: That matter will be taken under submission, also." (Tr. p. 19, l. 19—p. 20, l. 14)

(Further discussion between counsel)

"The Referee: Very well, this matter can probably be worked out later, now how much time do you want for the briefs.

Mr. Schwartz: Five days for me, or three if that is ample for you.

Mr. Palestine: I would like five days, because I have a good many other briefs.

[fol. 72] The Referee: Suppose we make it five, five and five.

Mr. Schwartz: And perhaps in the meantime we can work out some arrangement.

The Referee: Submitted on briefs, five, five and five." (Tr. p. 23, ll. 14-24)

It is hereby stipulated that the foregoing constitutes a full and correct statement of the evidence and proceedings at the hearing before the Referee herein on March 15, 1937, and that the same, together with the Report of John H. Chamness, temporary Trustee, filed herein on or about April 3, 1937, and the Report of L. Boteler, Trustee, filed on or about May 4, 1937, may be incorporated in a supplemental certificate to be filed with the District Court herein by said Referee, to be used in connection with the certificate heretofore filed with said Court pursuant to the Petition for Review filed herein on or about July 22, 1937, by the Motor Vehicle Department of the State of California, Ray Ingels, Director of Motor Vehicles of said State, and Howard E. Deems, Registrar of Motor Vehicles of said State.

U. S. Webb, Attorney General, by John O. Palestine, Deputy Attorney General, Attorneys for Petitioners for Review. David Schwartz, Attorney for L. Boteler, Trustee.



[fol. 73] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Bankruptcy No. 28563-C

In the Matter of RICHMAID CREAMERIES, INCORPORATED, a Corporation, Debtor

FINAL REPORT, FINAL ACCOUNT AND PETITION FOR DISCHARGE BY PERMANENT TRUSTEE

To the Honorable Judges of the District Court of the United States for the Southern District of California, Central Division, and to Honorable Ernest R. Utley, Referee in Bankruptcy:

I

Your petitioner alleges that he is the duly appointed qualified and acting permanent trustee of the estate of Richmaid Creameries, Incorporated, debtor; that he was appointed temporary trustee by an order of the above entitled court and thereafter confirmed and appointed as permanent trustee with authority to operate the business of the debtor, now the bankrupt, Richmaid Creameries, Incorporated.

II

That due to outside influences from the Truck Drivers Union, Local #692, imposed upon Richmaid Creameries, Incorporated, against the wishes of their own employees and by parties not interested financially or otherwise, the Richmaid Creameries was forced to make application for [fol. 74] relief under Section 77-B of the National Bankruptcy Act, in order to protect the interests of the stockholders and creditors from such influences. Under this procedure I was appointed temporary trustee on September 16, 1936, and permanently appointed on November 2, 1936, and served as such until January 19, 1937, during which time I conducted the business as a going concern.

III

Immediately after the temporary appointment on September 16, 1936, the creditors held a meeting and appointed a committee of three to cooperate with the trustee in the operation of the business, realizing however that the busi-

ness was operating at a loss, but taking into consideration the agreement made August 4, 1936, between Richmaid Creameries, Incorporated, and the Milk Institute of Southern California, (with offices in the Chamber of Commerce Building, Los Angeles), wherein they agreed to hold Richmaid Creameries harmless of any losses sustained while this condition with the labor union existed. It was thought advisable for the protection of the stockholders and creditors to operate said business until such time as this condition could be remedied. But failure on the part of the Milk Institute to live up to this agreement caused the Richmaid Creameries to suffer a loss at the hands of said Milk Institute of a large volume of business, resulting in financial losses (shown by Schedule "A" attached) to such extent that it was impossible to continue, and Richmaid Creameries was compelled to file petition for liquidation of the business [fol. 75] on January 19, 1937, at which time Your Honor appointed Mr. L. Boteler as trustee to liquidate.

#### IV

Attached to and a part of this report is a statement of receipts and disbursements, showing the operating losses of this business, together with claims for unpaid salaries, approved bills, etc., covering the period of my trusteeship. The business was operated on a cash basis during this time, and this accrued payroll and other unpaid bills are outstanding as a result of losses in the operation of the business. I believe these statements to be true and accurate, and as the greater part of these claims is for labor and much needed by these former employees, I pray the court to allow these claims at this time, since I understand there are sufficient funds on hand over and above a reserve for state taxes, court costs and other preferred claims to permit of a distribution of these moneys at this time.

#### V

That during the course of my trusteeship, under an order of the District Court I petitioned for leave to borrow money and issue trustee's certificates, but did not borrow the amount of money which I was authorized to borrow, but borrowed only the sum of \$2,000.00, for which I issued trustee's certificates One, Two, Three and Four of the face value of \$500.00 each, total \$2,000.00, no part of which I have paid

or redeemed. That such certificates bear interest at the rate of 5% per annum, and the date of issuance thereof was the 23rd day of September, 1936.

[fol. 76]

## VI

That as trustee I served in that capacity as well as operating the business, and devoted all of my time actually and actively to the business of the debtor; that the reasonable value of my services is \$300.00 per month, which for the period of September 16, 1936 to January 20, 1937 is four months and five days, and amounts to \$1249.00. That I have drawn during the time I acted as trustee, for my living expenses and which should be credited to and on account of the amount of \$1249.00, the sum of \$439.36.

## VII

The attached schedule "A" heretofore referred to shows the total receipts and the total disbursements from September 16, the time your petitioner commenced his duties as temporary trustee, to January 19 when he ceased to be permanent trustee and delivered the assets to the liquidating agent and liquidating trustee, L. Boteler.

## VIII

There is attached hereto a list of accrued payroll remaining unpaid, to-wit, for services rendered during the temporary and permanent trusteeship of your petitioner. That your petitioner paid payroll to the limit of his cash ability during his trusteeship, but the attached Schedule "B" pages one and two show the name and amounts due to labor for labor actually performed during the administration of your trustee, which claims are preferred labor claims and costs of administration and should be paid out of the funds in the hands of the trustee without further delay. That the said preferred labor claimants have filed [fol. 77] herein their individual claims for labor, claiming preferences. That during the course of administration of your trustee he has incurred debts which are prior debts and costs of administration, to the following persons at the following addresses and the following amounts, to-wit, Schedule "C" attached hereto.

## IX

That in the course of the operating of the business there have been issued quantity discount memoranda to whole-sale trade, which remain unpaid by the debtor and which have not been taken up by the debtor concern. That all of the said credit memoranda were issued in the course of operating the business and are now outstanding in favor of the following persons and in the following amounts, to-wit, as are shown on Schedule "D"; that the same are preferred claims of the administration.

Wherefore, petitioner prays that this, his final report and account as temporary trustee and permanent trustee be approved, that his compensation be fixed in the sum of \$1249.00 for acting as permanent and temporary trustee and for operating the business. That the court may make its order directing the present trustee to pay the costs of administration incurred as shown in the report and account, and that your petitioner may be discharged from his trust and his bond cancelled.

\_\_\_\_\_, \_\_\_\_\_, Petitioner.

[fol. 78] UNITED STATES OF AMERICA,  
STATE OF CALIFORNIA,

COUNTY OF LOS ANGELES, ss:

John H. Chamness, being by me first duly sworn, deposes and says that he is the petitioner in the above entitled matter; that he has read the foregoing Final Report and Account and Petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

John H. Chamness.

Subscribed and sworn to before me this — day of  
April, 1937. — — —, Notary Public in and for  
the County of Los Angeles, State of California.

[fol. 79] STATEMENT OF RECEIVERSHIP OF THE RICHMAID  
CREAMERIES, INC.

Receipts & Disbursements from Sept. 16, 1936 to Jan. 19,  
1937

Receipts	Disbursements
Sept. 16 to Oct. 1 .....	\$7,320.73
Oct. 1936 .....	15,568.56
Nov. 1936 .....	18,801.89
Dec. 1936 .....	18,145.19
Jan. 1 to Jan. 19, 1937 .....	10,169.86
<b>Total receipts .....</b>	<b>70,006.23</b>
Products Purchased, milk, cream, butter and other supplies Sept. 16 to Oct. 1, 1936 .....	\$5,704.86
Payroll .....	2,098.63
Power, light, water, telephone, rents, garage supplies, etc. ....	1,271.23
Nov. 1936 Products purchased .....	12,707.78
Payroll .....	5,198.80
Other expenses .....	3,668.83
Oct. 1936 Products purchased .....	10,180.13
Payroll .....	4,401.89
Other expenses .....	3,401.59
Dec. 1936 Products purchased .....	10,913.04
Payroll .....	5,174.42
Other expenses .....	2,150.27
Jan. 1 to Jan. 19, 1937 Products purchased .....	6,410.06
Payroll .....	2,642.18
Other expenses .....	1,121.96
Insurance, Williams & Co. Wlm. ....	160.23
Pacific Coast Club, Lions Club, Kiwanis .....	93.75
[fol. 80] Neon Signs .....	79.00
Insurance, Tom Mañon Co. ....	65.80
Rent, Garage in Wlm. ....	70.00
Rent, Parking lot and Shed .....	30.00
Store Rent, Long Beach .....	438.00
Southern Calif. Safe Co. ....	72.01
Long Beach Chamber of Commerce .....	6.50
Kuster, Wetzel Electrician .....	1.78
Comalac Service, Milk Bottle Rentals .....	102.28
Amazola Products .....	2.16



	Disbursements
Long Beach Advertising Club & Better Business Bureau .....	7.00
Robert Johnson, Milwaukee, Wis. ....	23.71
Los Angeles Bottle Exchange .....	308.00
Trade Discounts allowable on wholesale sales ..	599.41
Estimated state tax on old age pension .....	1,000.00
<b>Total</b> .....	<b>80,105.30</b>
Less Amount paid on automobiles during receivership .....	457.65
<b>Total</b> .....	<b>79,647.65</b>
Less Receipts as shown above .....	70,006.23
<b>Operating Loss</b> .....	<b>\$9,641.42</b>

#### SCHEDULE "A"

[Schedule "B" enumerates 34 persons to whom, respectively, are owing sums ranging from \$7.04 to \$323.58, and in the total amount of \$4,633.53 for accrued payroll during the period from September 16, 1936, to January 19, 1937, inclusive, as recited in Paragraph VIII of the foregoing Final Report of John H. Chamness.]

[fol. 81] Rupert B. Turnbull, 400 Title Insurance Bldg., Los Angeles, California.

Advanced for court costs and court expenses for the trustee in the course of his administration as follows:

To Clerk of the Superior Court, filing fee Chamness and Richmond vs. Golden State, et al. ....	\$7.00	
To balance (original bill \$15.00 partially paid) to John F. Walles, services and mileage on seven defendants in Chamness vs. Golden State .....	8.50	
Western Union Telegraph Company, Los Angeles, California .....	.40	15.90
Arthur Bond, agent United States Fidelity & Guaranty Company, premium on bond, balance (111 West 7th St., Los Angeles, California) .....		50.00

Southern California Edison Co., 139 E. 3rd Long Beach, California	137.12
Electric Products, 1112 Venice Blvd., Los Angeles, Cal.	161.20
Tucker & Co., Long Beach, Calif., 123 E. 1st St., (plate glass insurance)	10.69
Long Beach Credit Association, Long Beach, Calif. Jergins Trust Building	21.20
J. W. Okley, 526 Security Bldg., Los Angeles, Calif. Sept. 16-Jan. 20	21.00
F. F. Fierce, rent storage room, 244 E. 4th St., Long Beach, California, Jan. 1st to 20th	10.00
[fol. 82] Associated Telephone Company, Long Beach, California, 12/26/36 to 1/20/37—547 Elm Avenue	34.20
Better Business Bureau of Long Beach, 1200 Hartwell Building, Long Beach, California Nov. 1936 1/20/37	9.00
Mrs. Roggaro, R. F. D. No. 1, San Pedro, Calif. Milk Independent Milk Association, 117 W. 9th St., Los Angeles, California	569.15
Helen J. Kirkpatrick, C/o George Taubman, Attorney, Security Building, Long Beach, California	148.87
Comolac Services, 1236 Compton, Los Angeles, Calif.	187.50
Milk Institute of Southern California (4th Fl.) Chamber of Commerce Bldg., Los Angeles, California	262.82
Challenge Cream & Butter Association, Los Angeles California, 929 E. 2nd St., Los Angeles	36.36
Press Telegram, 5th & Pine Ave., Long Beach, Calif.	624.39
Long Beach Chamber of Commerce, 249 American Ave., Long Beach	6.00
	8.82

#### SCHEDULE "C" (Page 1)

Crescent Towel Supply, 1627 South Broadway, Los Angeles, Calif. Aug., Sept.	10.84
Chocolate Products, 741 Kohbe St., Los Angeles, Cash purchases Nov. 2, 1936	2.00
[fol. 83] Griffen Hassen Laboratories, 650 E. 20th St., Los Angeles, California August 14	2.50
Eddies, 850 El Centro, South Pasadena, California	6.50

Moore & Sons, 146 Locust Ave., Long Beach, California		
Nov. 1—10M daily reports	70.00	
10M retail reports	72.50	142.50
Home Ice & Cold Storage Co., 625 W. Anaheim Ave., Long Beach, California		
		77.25
Greens, Inc., 542 Pine Avenue, Long Beach, Calif.		
Oct. 8—2500 R. M. D. cards		12.88
Long Beach Kiwanis Club, 37 Pine Avenue, Long Beach, California October, November, December, 1936		
		23.50
Tom Maison, Inc. Co., 303 Avalon, Wilmington, Calif. 2 insurance policies 65.80 7.74)		
		73.54
Estimated tax on State Old Age Pension		1,000.00
Milk Institute of Los Angeles, Trustee's Certificates, Chamber of Commerce Building, Los Angeles		
		2,000.00
		<hr/>
		\$5,665.73

#### SCHEDULE "C" (Page 2)

[Schedule D enumerates 43 persons and/or businesses to whom, respectively, are owing sums ranging from ninety-eight cents to \$11.46, and in the total amount of \$316.26, for the discounts specified in Paragraph IX of the foregoing Final Report of John H. Chamness.]

[fol. 84] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA

In the Matter of RICHMAID CREAMERIES, INC., Debtor

FIRST REPORT AND ACCOUNT OF L. BOTELER, TRUSTEE, PETITION FOR EXPENSES AND DIVIDEND

To the Honorable Ernest R. Utley, Referee in Bankruptcy:

The verified report and account of L. Boteler respectfully shows:

#### I

That he is the duly qualified and acting Trustee for the estate of the above named debtor.

## II

That your Petitioner qualified with a bond in the sum of \$20,000.00 as fixed by the Court herein and immediately took charge of and continue the operation of the debtor's business—that of a creamery located at 120 G Street, Wilmington, California, and placed his Agent, A. J. Johnson in charge.

[fol. 85]

## III

That upon completion of physical inventory and according to the debtor's records your petitioner found assets as follows:

Employees' notes receivable approximately	\$3500.00
Accounts receivable	7500.00
Merchandise consisting of ice cream, milk, cream, butter, refrigeration, ice cream and auto supplies	1678.23
Merchandise consisting of containers, bottle caps, bags, caps, etc.	2341.87
Plant machinery	18382.20
Motor trucks, bodies and car	6945.91
Garage equipment	351.00
Bottles, cases, cans at 120 G Street	2326.78
Ice cream cabinets on territory and storage	4868.49
Office Furniture and fixtures 120 G St. Wilmington	\$674.50
Office furniture Long Beach Office	551.25

Real Estate:

Equity in real property located at 120 G St. Wilmington, California.

## VI

As it was apparent from the report of John H. Chamness, former trustee herein, that the debtor's business was losing money and also apparent to your petitioner that there was no purpose in continuing the operation of the [fol. 86] debtor's business any longer than absolutely necessary to the end that the assets be disposed of to the best advantage, your petitioner first advertised the creamery for sale in the local newspaper as a going concern and made inquiry among the members of the industry locally

**MICRO CARD**

TRADE

MARK



**22**

**39**



**1041**

**65**





but was unable to find any one ready, able and willing to make a reasonable offer for said business as a going concern. Next, your petitioner made a canvass among the various firms in the industry in an attempt to sell the good will of the business together with a list of customers and on or about the middle of February, 1937, your petitioner obtained a sound offer from the Mountain View Dairies of Long Beach, California, of \$8250.00 for the good will, all of the bankrupt's right, title and interest in and to the use of trade name "Richmaid" together with lists of customers, bottles, cans, bottle crates, and ice cream cabinets loaned by the debtor to various ice cream customers and certain automotive equipment. Your petitioner then issued upwards of 700 letters to various members of the industry up and down the state of California as well as to various creameries in Arizona and Nevada advising that the assets would be offered for sale in open Court on February 25, 1937, and also advertised said offering of assets for sale in the Los Angeles Daily Journal and sent notices to various local speculators.

[fol. 87]

V

That said offering of assets for sale duly came on for hearing before this Court on February 25, 1937, and the following bids for a portion of the assets were duly confirmed, to-wit:

O. R. Parson, one ice cream hardening box and compressor .....	\$300.00
Mountain View Dairies, Long Beach, for good will, right to use trade name, list of customers, bottles, cans and bottle crates, certain ice cream cabinets and certain automotive equipment .....	8250.00
Mountain View Dairies merchandise consisting of milk and milk products .....	585.93
Mr. and Mrs. C. A. Lynch doing business as Richmaid Cafe for all of the debtor's right, title and interest in leasehold on the premises at corner 4th and American Avenue, Long Beach, California, together with trustee's right, title and interest in and to restaurant fixtures therein subject to balance due, secured by conditional sales contract .....	600.00

After confirmation of the foregoing your Petitioner then offered all of the remaining physical assets for sale for which Michael Tauber of this city bid the sum of \$8,000.00 free and clear, excepting only the real property which offer your petitioner respectfully represented to this Court was inadequate, and then asked leave of and obtained permission [fol. 88] from this court to sell the remaining assets at private sale. That thereupon your petitioner delivered over the property sold and discontinued further operation of the business, but continued his agent A. J. Johnson in charge and up to this time has sold machinery, and equipment piece meal which together with sales confirmed in open Court on February 25, 1937, makes a total of \$22,645.47. Your petitioner still has on hand to sell the following:

Approximately 18 automobile trucks and delivery cars

1—Large bottle washer machine

1—Pastuerizer

Various other items of equipment and office furniture together with debtor's equity in real estate at Wilmington, California. The best offer for the real estate had as of this date is the sum of \$1,000.00.

#### IV

That in the meantime your petitioner has caused diligent efforts to be made to collect outstanding accounts receivable and has collected various sums and amounts as set forth in petitioner's report and account of receipts and disbursements Marked Exhibit "B" hereto attached and made a part hereof.

#### VII

That with leave of this Court your petitioner has paid labor claims amounting to the sum of \$4575.96 said labor claims having arisen prior to your petitioner's appointment herein.

[fol. 89]

#### VIII

That John H. Chamness, former trustee, appears to have incurred debts during the period of his operations under order of this Court in the approximate sum of \$5600.00 which are unpaid to date, together with the amount due

the Department of Employment, State of California and Internal Revenue Service amounting to upwards of \$1,000.00. Your Petitioner respectfully prays that the Court instruct him at the hearing of this report and account relative to payment of same.

### IX

That your petitioner respectfully represents that his action in continuing operation of the business from January 19, 1937, to and including March 13, 1937, while resulting in a nominal operating loss, said operation did result in your petitioner consummating a sale of customers, good will and trade name, together with bottles, cans, crates, etc. scattered all over the cities of Wilmington and Long Beach and resulted in recovery for this estate which otherwise would not have resulted had your petitioner immediately discontinued operation of the business at the time of his appointment.

### X

That attached hereto and marked Exhibits "A" and "B" is a complete and true account of all receipts and disbursements together with a list of expenses, fees and allowances to be fixed, established and ordered paid herein.

### XI

That during the period of operation from January 19th to March 13th your trustee sold merchandise and collected [fol. 90] on outstanding accounts receivable the sum of \$25,776.28.

### XII

That your Trustee be allowed as partial payment on account of his statutory fee the sum of \$300.00 and in addition thereto your petitioner asks that he be allowed the sum of \$624.32 on account of operating the business (based on a total of \$48,432.37 receipts to date) together with the sum of \$40.00 representing general office, expense, telephone bills, general stenographic and clerical hire, postage, stationery, etc. as set forth in Exhibit "C" herein.

### XIII

That during the administration of said estate, it was necessary for your petitioner to employ counsel to consult

concerning legal matters arising in said administration. That upon Court Order your trustee employed David Schwartz, attorney at law of Los Angeles, California, who has rendered valuable service to your petitioner herein and who has agreed to accept as compensation for such services the amount fixed and ordered paid by this Court.

Wherefore, your Trustee prays that an order be made allowing and approving his First Report and Account, fixing establishing allowing and ordering paid the expenses, fees and allowances to be fixed, established, allowed and ordered paid herein, and declaring first dividend to creditors.

[fol. 91]      EXHIBIT "B" TO FIRST REPORT

Operating Statement of Business at 120 West G Street,  
Wilmington, Cal.

Receipts

1937.

January

20	Cash on hand at time of taking charge of business	\$467.97
20	Cash sales and collections	459.51
21	Cash sales and collections	312.71
22	Cash sales and collections	494.90
23	Cash sales and collections	388.14
24	Cash sales and collections	195.66
25	Cash sales and collections	634.10
26	Cash sales and collections	379.52
27	Cash sales and collections	931.21
28	Cash sales and collections	344.95
29	Cash sales and collections	566.50
30	Cash sales and collections	453.91
31	Cash sales and collections	205.71

February

1	Cash sales and collections	732.21
2	Cash sales and collections	389.48
3	Cash sales and collections	466.71
4	Cash sales and collections	476.42

[fol. 92]

## Disbursements

1937.

January

21	L. A. Bottle Exchange, bottles	\$20.88
	W. A. Thompson, milk products	13.18
	F. A. Roggero, milk products	100.00
	Joe Duarte, milk products	60.00
	Knudsen Creamery, cheese	5.18
	Elmore Lambing, gas (and oil)	16.88
	Challenge Creamery, cream and butter	175.37
	Petty cash, disbursed cash as per itemized list in files	23.35
	C. F. Larson, on payroll account	20.00
	Deduct returned check	1.50
20	F. A. Roggero, milk products	100.00
	Joe Duarte, milk	60.00
	W. A. Thompson, milk	24.63
	J. L. Wood, petty cash fund	15.00
	Challenge Creamery, cream and butter	176.37
	Elmore Lambing, gas	16.88
	Western Stopper Company, milk caps	10.06
22	Disbursed from petty cash as per itemized list in files	23.04
	W. A. Thompson, milk	11.59
	Knudsen Creamery Company, cheese	5.18
	Challenge Creamery, cream and butter	101.38
	Elmore Lambing, gas	16.88

[fol. 93]

	Joe Duarte, milk	60.00
	F. A. Roggero, milk	100.00
	Mountain View Dairies, cream	67.57
	C. L. Holbert, payroll account	10.00
23	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	5.75
	Challenge Creamery, cream and butter	71.98
	Elmore Lambing, gas	20.25
	Duarte, milk	60.00
	Roggero, milk	100.00
	Mountain View, cream	50.62
	Disbursed from petty cash as per itemized list in files	16.78
24	W. A. Thompson, milk	11.59



## Disbursements—Continued

1937.

## January

	Mountain View, cream	67.57
25	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	10.14
	Challenge Creamery, cream and butter	218.31
	Elmore Lambing, gas	16.88
	Duarte, milk	120.00
	Roggero, milk	200.00
	Mountain View, cream	67.57
	Bergan Tire Company, tire and oil	14.42
	Western Stopper Company, milk caps	32.48
26	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	3.54
	Challenge Creamery, cream and butter	105.83
	Elmore Lambing, gas	16.88
	Duarte, milk	60.00
	Roggero, milk	100.00
[fol. 94]		
26	Mountain View, cream	\$67.57
	Disbursed from petty cash as per itemized list in files	37.81
	Gas Company, natural gas	17.98
	Bureau of Power & Light, water and power	49.10
	L. A. Bottle Exchange, bottles	28.08
	Deduct returned check	6.00
27	Disbursed from petty cash as per itemized list in files	8.59
	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	5.94
	Challenge Creamery, cream and butter	124.53
	Elmore Lambing, gas	16.88
	Duarte, milk	60.00
	Roggero, milk	100.00
	Mountain View, cream	50.68
28	Disbursed from petty cash as per itemized list in files	9.11
	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	6.52
	Challenge Creamery, cream and butter	115.74
	Elmore Lambing, gas	20 25

## [fol. 95] Disbursements—Continued

1937.

## January

Duarte, milk	60.00
Roggero, milk	100.00
Mountain View, cream	67.57
Frigid Products, ice cream bars	17.20
Marguerite Wood, payroll account	30.41
Marie Klauser, " "	16.68
A. C. Lenon " "	39.24
E. C. Stuart " "	33.35
Al Henderson " "	29.43
Andrew Tate " "	30.41
C. F. Larson " "	29.43
R. L. Chamness " "	49.05
J. L. Wood " "	49.05
H. M. Coffey " "	40.22
O. S. Peterson " "	19.62
C. H. Bucy " "	34.33
Don Bucy " "	14.71
Ralph Spainhour, " "	34.33
Miriam Farr " "	15.70
Capitola Davidson " "	9.81
John Vatan " "	19.62
J. W. Walsh " "	40.22
H. A. Lee " "	40.22
Riley Patton " "	36.30
Chas. K. Koski " "	26.49
H. R. Chamness " "	26.49
S. Arthur Foster " "	34.33
Wm. Woestman " "	27.47
Glyn Nugent " "	29.43

[fol. 96]

28 Don Sorenson, payroll account	\$33.35
Geo. H. Fortner " "	9.81
D. E. Steele " "	9.81
Chas. L. Holbert " "	19.62
J. W. Wasson " "	31.39
J. H. Chamness " "	49.05
29 Disbursed from petty cash as per itemized list in files	21.27
W. A. Thompson, milk	11.59
Knudsen Creamery, cheese	4.98

## Disbursements—Continued

1937.

## January

	Challenge Creamery, cream and butter	90.58
	Elmore Lambing, gas	16.88
	Duarte, milk	60.00
	Roggero, milk	100.00
	Mountain View, cream	75.47
	Western Stopper, milk caps	10.06
30	Disbursed from petty cash as per itemized list in files	20.74
	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	6.49
	Challenge Creamery, cream and butter	102.23
	Elmore Lambing, gas	20.25
	Duarte, milk	60.00
	Roggero, milk	100.00

{fol. 97}

	Mountain View, cream	50.68
	O. J. Weber, cream caps	11.50
31	W. A. Thompson, milk	11.59
	Mountain View, cream	75.07
	Bank charges	14.23

## February

1	Disbursed from petty cash as per itemized list in files	22.45
	W. A. Thompson, milk	11.59
	Knudsen Creamery, cheese	7.70
	Challenge Creamery, cream and butter	173.27
	Elmore Lambing, gas	20.25
	Duarte, milk	120.00
	Roggero, milk	200.00
	Mountain View, cream	99.15
2	Petty cash disbursed as per filed list	44.21
	Thompson, milk	11.59
	Knudsen Creamery, cheese	5.94
	L. A. Bottle Exchange, bottles	18.00
	Western Stopper, milk caps	10.06
	King Extract Company, flavoring	13.75
	Frigid Products, ice cream bars	11.20
	Challenge Creamery, cream and butter	128.58
	Elmore Lambing, gas	20.25

## Disbursements—Continued

1937.

February

Duarte, milk	60.00
Roggero, milk	100.00
Mountain View, cream	96.83
Gas Company, natural gas	17.42
Bureau of Power and Light, water and power	49.43

[Col. 98]

3 Petty cash disbursed as per filed list	\$4.03
Thompson, milk	11.59
Knudsen Creamery, cheese	6.38
Challenge Creamery, cream and butter	42.85
Elmore Lambing, gas	16.88
Duarte, milk	60.00
Roggero, milk	100.00
Mountain View, cream	101.65
4 Petty cash disbursed as per filed list	24.63
Thompson, milk	11.59
Knudsen Creamery, cheese	6.12
Challenge Creamery, cream and butter	103.58
Elmore Lambing, gas	16.88
Duarte, milk	60.00
Roggero, milk	100.00
Mountain View, cream	95.03
J. V. Moore, rent 254 E. 4th, L. B.	204.00

## [fol. 99] STIPULATION FOR APPROVAL OF STATEMENT OF EVIDENCE

It Is Hereby Stipulated and Agreed, by and between the attorneys for the appellants Ray Ingels, as Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of said State, and the attorney for the appellee, L. Boteler, trustee of Richmaid Creameries, Inc., Bankrupt, that the foregoing Statement of Evidence has been presented in time; that in conjunction with the judgment roll it fully and correctly sets forth all the facts put in evidence and proceedings had in this action material to the appeal of said appellants; that it may be approved, allowed and settled by the Judge of the above en-

titled Court as correct and complete in all its respects, and that the same shall be made a part of the record in said case and be the Statement of Evidence therein.

U. S. Webb, Attorney General, by John O. Palstine,  
Deputy Attorney General, Attorneys for Ap-  
pellants: David Schwartz, Attorney for Appellee.

---

[fol. 100] IN UNITED STATES DISTRICT COURT

ORDER SETTLING AND APPROVING STATEMENT OF EVIDENCE

The foregoing Statement of Evidence duly proposed and agreed upon by counsel for the respective parties, is presented in time and is full, complete and correct in all respects, and constitutes all of the evidence herein relating to the appeal by the above named appellants, and is hereby approved, allowed and settled within the judgment term, and made, and shall be printed as, a part of the record herein for purposes of said appeal herein.

Dated this 19th day of January, 1938.

George Cosgrave, United States District Judge.

[File endorsement omitted.]

---

[fol. 101] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 28563-C

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL—Filed  
November 20, 1937

To the Honorable George Cosgrave, Judge of the United States District Court, Southern District of California, Central Division:

Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of said State, and the Motor Vehicle Department of said State of California, respondents to an Order to Show Cause



issued by the Referee in the above entitled proceeding, feeling themselves aggrieved by the order of the above court, entered herein on October 22, 1937, confirming, and denying the petition of the said respondents for a review of, that certain order of the Honorable Ernest R. Utley, Referee herein, dated June 14, 1937, ordering the Motor Vehicle Department of said State and said officers thereof to file in said bankruptcy proceeding their claim for registration and license fees owing upon motor vehicles operated by the trustee of the above named bankrupt estate, before thirty days from the date of said order or be forever barred, and ordering any and all penalties assessed in connection with [fol. 102] said license fees to be set aside, and setting said penalties aside, and ordering the trustee to sell said motor vehicles free and clear of any and all liens of said Department of Motor Vehicles or said officers, and overruling the objection of said Department and said officers to the summary jurisdiction of said Referee.

Pray for the Allowance of An Appeal from said order and each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Error filed herewith, and prays that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to said Circuit Court of Appeals under the rules of such court in such cases made and provided, and prays that an order be made fixing the amount of any bond required of appellant herein.

Dated: November 20, 1937.

U. S. Webb, Attorney General, by John O. Palstine,  
Deputy Attorney General, Attorneys for Ray  
Ingels, Director of Motor Vehicles of the State of  
California, Howard E. Deems, Registrar of Motor  
Vehicles of the State of California, and the Motor  
Vehicle Department of the State of California, Ap-  
pellants.

[fol. 103]

#### ORDER ALLOWING APPEAL

Upon reading the foregoing petition for appeal and upon the files and records herein,

It Is Ordered that an appeal be, and the same is hereby allowed to Ray Ingels, Director of Motor Vehicles of the

State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, to have the United States Circuit Court of Appeals, for the Ninth Circuit review the order of this court dated October 22, 1937, confirming and denying the petition of said appellants herein for a review of, that certain order of the Honorable Ernest R. Utley, Referee herein, dated June 14, 1937, ordering the Motor Vehicle Department of said State and certain officers thereof to file in said bankruptcy proceeding their claim for registration and license fees owing upon motor vehicles and against the above named bankrupt estate, before thirty days from the date of said order or be forever barred, and ordering any and all penalties assessed in connection with said license fees to be set aside, and setting said penalties aside, and ordering the trustee to sell said motor vehicles free and clear of any and all liens of said Department of Motor Vehicles or said officers, and overruling the objection of said Department and said officers to the summary jurisdiction of said Referee; And,

[fol. 104] It Is Further Ordered that citation be issued as provided by law, and that a transcript of the record, exhibits, statement of evidence, stipulation, pleadings, and all proceedings herein be prepared by the clerk of this court and transmitted to said Circuit Court of Appeals, so that he shall have the same in said Circuit Court within thirty days of this date, or such time as may be provided by further order of this court.

It Is Further Ordered that cost bond in said appeal be and the same is hereby fixed in a sum of two hundred and fifty Dollars (\$250.00), the clerk to approve said bond.

Dated: November 20, 1937.

Geo. Cosgrave, Judge.

[fol. 105] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed November 20, 1937

Come Now Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of said State of California, appellants herein, and respectfully urge that the above entitled court erred in making its order of October 22, 1937, confirming, and deny-

ing the petition of said appellants for a review of, that certain order of the Honorable Ernest R. Utley, Referee herein, dated June 14, 1937, and relating to the payment of license fees and penalties thereon for the operation of certain automotive equipment of the bankrupt upon the public highways of the State of California, and present, in connection with their petition for appeal from said order, the following assignments of error:

### I

That the finding of the referee that neither of the trustees herein had any funds with which to pay on or before February 4, 1937, the fees in question, which finding was not disapproved or modified by the District Court, is contrary to the law, the evidence and records on file herein.

### II

That the finding of the referee, which was not disapproved or modified by the District Court, that the trustee is entitled [fol. 106] to a bar order requiring the appellant state officers to file a claim for said fees or be forever barred from asserting any claim or claims for taxes and/or registration and license fees against said motor vehicles, is contrary to the law, the evidence and the records on file herein.

### III

That the conclusion of law of said referee, which was not modified or rejected by said District Court, that the appellants herein had no claim against the estate herein, is contrary to the law and the findings of fact.

### IV

That the conclusion of law of the referee, which conclusion was not modified or rejected by said District Court, that said Department of Motor Vehicles had no valid lien upon the motor vehicles in question, is contrary to the law and the findings of fact.

### V

That the order of said Referee, as confirmed by said District Court, setting aside any and all penalties assessed upon or claimed against said motor vehicles, is in excess of the jurisdiction of said Referee, and said court, and is contrary to the law and the evidence, and is not warranted or supported by the Referee's own conclusions of law.

## VI

That the order of the Referee, confirmed by said District Court, directing the trustee herein to sell said motor vehicles [fol. 107] free and clear of any and all claims or liens of the appellants, is in excess of the jurisdiction of said Referee and said court, and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

## VII

That the order of the Referee, as confirmed by the District Court herein, requiring said appellants to "file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days" from the date of said order or be forever barred from asserting said claim or claims either against said vehicles or against this bankrupt estate or against the trustee herein individually or as such trustee, is in excess of the jurisdiction of said Referee and said court, and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

Wherefore, said Ray Ingels, Director of the Motor Vehicle Department of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, appellants herein, pray that said order dated October 22, 1937, confirming said order of said Referee dated June 14, 1937, be and that each of them be reversed, and that an order be made and entered reversing said order of the District Court and ordering said trustee to pay from the proceeds of any sale of said motor vehicles free and clear of any and all liens, not only the motor vehicle license fees as [fol. 108] provided by law, but in addition thereto the penalties thereon as provided by law, and for costs herein, and for such other and further order and relief as may be meet and proper in the premises.

Dated: November 20, 1937.

U. S. Webb, Attorney General, by John O. Palstine, Deputy Attorney General, Attorneys for Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants.

[Endorsed:] Received copy of the within Petition For Appeal and Order Allowing Appeal and Assignments of Error this 20th day of Nov. 1937. David Schwartz, Attorney for Trustee.

[File endorsement omitted.]

[fol. 109] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 8711

In the Matter of RICHMAID CREAMERIES, INC., a Corporation,  
Debtor,

RAY INGELS, Director of Motor Vehicles of the State of California, HOWARD DEEMS, as Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants,

vs.

L. BOTELER, Trustee of Richmaid Creameries, Inc., a corporation, Debtor, Appellee

PETITION FOR APPEAL—Filed Nov. 22, 1937

To the Honorable Justices of the Above Entitled Court:

The Honorable Ernest R. Utley, Referee in Bankruptcy in the District Court of the United States, Southern District of California, Central Division, having, on June 14, 1937, made an order in the above bankruptcy proceeding, ordering Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of said State, and the Motor Vehicle Department of said [fol. 110] State, to file in said bankruptcy proceeding their claim for registration and license fees owing upon motor vehicles operated by the trustee of the above named bankrupt estate, before thirty days from the date of said order, or be forever barred, and ordering any and all penalties assessed in connection with said license fees to be set aside, and setting said penalties aside, and ordering said trustee to sell said motor vehicles free and clear of any and all liens of said Department of Motor Vehicles or said officers,



and overruling the objection of said department and said officers to the summary jurisdiction of said referee; and

The Honorable George Cosgrave, Judge of said District Court, having on October 22, 1937, made an order denying the petition of said Department of Motor Vehicles and said officers for a review of said order of said referee, and said petitioners for review feeling themselves aggrieved by said order of said judge confirming said order of said referee,

Said Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, as Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Do Hereby Petition for the Allowance of an Appeal from said order of said District Court to the United States Circuit Court of Appeals [fol. 111] peals, for the Ninth Circuit, for the reasons and upon the grounds set forth in the assignment of errors filed herewith, and said petitioners pray that their appeal may be allowed and a citation issued directed to L. Boteler, trustee of Richmaid Creameries, Inc., a corporation, debtor, commanding him to appear before said United States Circuit Court of Appeals, for the Ninth Circuit, to do and receive what may be required in the interests of justice in the premises, and that a transcript of the record, exhibits, statement of evidence, stipulations, pleadings, and all proceedings herein, duly authenticated, may be transmitted to said United States Circuit Court of Appeals, for the Ninth Circuit, or for such other and further relief as may be meet and proper in the premises.

Your petitioners respectfully represent that the time within which this appeal is required to be taken has not permitted the petitioners to furnish this Court with a complete transcript on which to exercise its discretion in allowing said appeal; that attached hereto, however, marked Exhibit "A", and hereby made a part hereof as though set forth herein in full, is a copy of pertinent portions of the "Petition for Review of Order of Referee in Bankruptcy" as filed in the said District Court; that such petition fully sets forth the proceedings had and the orders made, the review of which the petitioners desire to have this Court make and for which said petitioners hereby petition this Court for the allowance of an appeal.

[fol. 112] Also attached hereto, marked Exhibit "B", and hereby made a part hereof as though set forth herein in full, is a copy of the order made by the referee, which

order the District Judge confirmed by his minute order which merely denied the Petition for Review of said referee's order.

Dated: November 20, 1937.

U. S. Webb, Attorney General, by John O. Palstine, Deputy Attorney General, Attorneys for Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, Appellants.

(Clerk's Note: The exhibits referred to are not printed following this petition as they already appear in the transcript in their proper place.)

[File endorsement omitted.]

[fol. 113] IN UNITED STATES CIRCUIT COURT OF APPEALS

ASSIGNMENTS OF ERROR—Filed Nov. 22, 1937

Come now Ray Ingels, Director of Motor Vehicles of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of said State of California, appellants herein, and respectfully urge that the District Court of the United States, Southern District of California, Central Division, erred in making its order of October 22, 1937, confirming, and denying the petition of said appellants for a review of that certain order of the Honorable Ernest R. Utley, Referee herein, dated June 14, 1937, and relating to the payment of license fees and penalties thereon for the operation of certain automotive equipment of the bankrupt upon the public highways of the State of California, and present, in connection with their petition for appeal from said order, the following assignments of error:

# I

That the finding of the referee that neither of the trustees herein had any funds with which to pay on or before February 4, 1937, the fees in question, which finding was not disapproved or modified by the District Court, is contrary to the law, the evidence and records on file herein.

## II

That the finding of the referee, which was not disapproved or modified by the District Court, that the trustee is entitled to a bar order requiring the appellant state officers to file a claim for said fees or be forever barred from asserting any claim or claims for taxes and/or registration and license fees against said motor vehicles, is contrary to the law, the evidence and the records on file herein.

[fol. 114]

## III

That the conclusion of law of said referee, which was not modified or rejected by said District Court, that the appellants herein had no claim against the estate herein, is contrary to the law and the findings of fact.

## IV

That the conclusion of law of the referee, which conclusion was not modified or rejected by said District Court, that said Department of Motor Vehicles had no valid lien upon the motor vehicles in question, is contrary to the law and the findings of fact.

## V

That the order of said referee, as confirmed by said District Court, setting aside any and all penalties assessed upon or claimed against said motor vehicles, is in excess of the jurisdiction of said referee, and said court, and is contrary to the law and the evidence and is not warranted or supported by the referee's own conclusions of law.

## VI

That the order of the referee, confirmed by said District Court, directing the trustee herein to sell said motor vehicles free and clear of any and all claims or liens of the appellants, is in excess of the jurisdiction of said referee and said court, and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

## VII

That the order of the referee, as confirmed by the District Court herein, requiring said appellants to "file their claim or claims for the registration and license fees owing upon

said motor vehicles and against the above named bankrupt estate on or before thirty days" from the date of said order [fol. 115] or be forever barred from asserting said claim or claims either against said vehicles or against this bankrupt estate or against the trustee herein individually or as such trustee, is in excess of the jurisdiction of said referee and said court, and is contrary to the law and the evidence and to the findings of fact and conclusions of law herein.

Wherefore, said Ray Ingels, Director of the Motor Vehicle Department of the State of California, Howard E. Deems, Registrar of Motor Vehicles of the State of California, and the Motor Vehicle Department of the State of California, appellants herein, pray that said order dated October. 22, 1937, confirming said order of said referee dated June 14, 1937, be and that each of them be reversed, and that an order be made and entered reversing said order of the District Court and ordering said trustee to pay from the proceeds of any sale of said motor vehicles free and clear of any and all liens, not only the motor vehicle license fees as provided by law, but in addition thereto the penalties thereon as provided by law, and for costs herein, and for such other and further order and relief as may be meet and proper in the premises.

Dated: November 20, 1937.

U. S. Webb, Attorney General, by John O. Palstine,  
Deputy, Attorneys for Appellants.

[File endorsement omitted.]

[Endorsed:] Filed Nov. 23, 1937 at 5 o'clock p. m. R. S. Zimmerman, Clerk. By M. R. Winchell, Deputy.

[fol. 116] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—Nov. 22, 1937

Upon consideration of the petition of Ray Ingels, Director of Motor Vehicles of the State of California, et al., for allowance of appeal herein under section 24 (b) of the Bankruptcy Act, filed Nov. 22, 1937, and of the assignments of error thereon, filed therewith, and by direction of the court,

It is Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the District Court of the United States for the Southern District of California, Central Division, made on October 22, 1937, denying the petition for a review of the order of the referee herein, be, and hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00) with good and sufficient security, within ten days from date.

It is Further Ordered that if an appeal has been allowed in this cause by said District Court, and a cost bond given on such appeal, then no additional cost bond need be given on this appeal.

I Hereby Certify that the foregoing is a full, true and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22nd day of November, A. D. 1937.

Paul P. O'Brien, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit. (Seal.)

[Endorsed:] Filed Nov. 27, 1937 at 41 min. past 12 o'clock P. M. R. S. Zimmerman, Clerk. By F. Betz, Deputy Clerk.

[fols. 118-120] Bond on appeal for \$250.00 approved and filed Nov. 24, 1937, omitted in printing.

[fol. 121] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION IN LIEU OF PRAECIPE FOR TRANSCRIPT OF RECORD  
ON APPEAL—Filed January 19, 1938

To the Clerk of the above entitled district court:

We hereby respectfully request you to prepare and certify to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the transcript of record on the appeal to said Circuit Court to reverse the decree and order



made by said District Court on October 22, 1937, denying the petition of Ray Ingels, Director of Motor Vehicles of the State of California and Howard E. Deems, Registrar of Motor Vehicles of said State to review, and confirming, the order of the Referee in Bankruptcy herein made and entered on June 14, 1937, said transcript to consist of the following papers and documents now on file in said District Court:

1. Petition for order setting aside penalties against bankrupt.

2. Order to Show Cause, dated March 6, 1937, issued on said Petition.

[fol. 122]. 3. Amended Petition for order setting aside penalties against bankrupt.

4. Amended Order to Show Cause dated April 8, 1937.

5. Opinion of Referee, dated May 25, 1937.

6. Findings of Fact and Conclusions of Law.

7. Petition for review of order of Referee in Bankruptcy.

8. Referee's Certificate on Petition for Review.

9. Referee's Supplemental Certificate on Petition for review.

10. Minute order, dated October 22, 1937, of above District Court, confirming, and denying petition for review of, said referee's order of June 14, 1937.

11. Petition for appeal and order allowing same, and assignments of error, filed in the United States District Court.

12. Citation issued by said District Court.

13. Copies of petition for appeal, assignments of error, and order allowing appeal, filed in the United States Circuit Court of Appeals for the Ninth Circuit.

14. Citation issued by said Circuit Court.

15. Cost Bond on Appeal.

16. Statement of Evidence.

17. This Praecipe.

It is hereby stipulated that the foregoing shall constitute the transcript of record herein on this appeal. It is further stipulated that in lieu of copying the names and titles of the court, the title and number to the cause, the same may, in said transcript of record on this appeal, be abbreviated as follows: (Title of court and cause)

Dated: January 18, 1938.

DAVID SCHWARTZ,

—Attorney for Appellee,  
Trustee in Bankruptcy.

U. S. WEBB,

Attorney General

By JOHN O. PALSTINE,

Deputy Attorney General

Attorneys for Appellants

[Endorsed]. Filed R. S. Zimmerman, Clerk at 56 min. past 1 o'clock Jan. 19, 1938 P. M. By M. R. Winchell, Deputy Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 123 pages, numbered from 1 to 123 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citations; petition for order setting aside penalties against Bankrupt; order to show cause; amended petition for order setting aside penalties against Bankrupt; amended order to show cause; opinion of Referee, and findings of fact and conclusions of law, and order; petition for review of order of Referee; Referee's certificate on petition for review; Referee's supplemental certificate on petition for review; order of October 22, 1937; statement of evidence; petition for appeal, order allowing appeal and assignment of errors in the United States District Court; petition for appeal, assignment of errors and order allowing appeal in the United States Circuit Court; bond on appeal, and stipulation in lieu of praecipe.

I do further certify that the amount paid for printing the foregoing record on appeal is \$153.20 and that said amount has been paid the printer by the appellants herein and a receipted bill is here-

with enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to \$19.10 and that said amount has been paid me by the appellants herein.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 2nd day of February, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of our Independence the One Hundred and Sixty-second.

[Seal]

R. S. ZIMMERMAN,  
Clerk of the District Court of the  
United States of America, in  
and for the Southern District  
of California.

By EDMUND L. SMITH,

Deputy.

[Endorsed]: Printed Transcript of Record. Filed  
February 3, 1938. Paul P. O'Brien, Clerk.





---

No. 8711

---

IN THE

**United States Circuit Court of Appeals****For the Ninth Circuit**

In the Matter of

**RICHMAID CREAMERIES, INC.,**  
a corporation,

Debtor.

**RAY INGELS, Director of Motor Vehicles of the  
State of California, HOWARD E. DEEMS, as  
Registrar of Motor Vehicles of the State of  
California, and the MOTOR VEHICLE DE-  
PARTMENT OF THE STATE OF CALI-  
FORNIA,**

Appellants,

vs.

**L. BOTELER, Trustee of the Estate of RICH-  
MAID CREAMERIES, INC., a corporation,**  
Debtor,

Appellee.

**Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division.**

**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**



**United States Circuit Court of Appeals  
for the Ninth Circuit**

**Excerpt from Proceedings of Wednesday, June  
22, 1938.**

**Before: Garrecht, Stephens and Healy,  
Circuit Judges.**

**[Title of Cause.]**

**ORDER OF SUBMISSION**

Ordered appeal in each of above causes argued by Mr. John O. Palstine, Deputy Attorney General, State of California, counsel for appellants, and by Mr. David Schwartz, counsel for appellee, and submitted to the court for consideration and decision.

---

**United States Circuit Court of Appeals  
for the Ninth Circuit**

**Excerpt from Proceedings of Thursday, December 15, 1938.**

**Before: Garrecht, Haney and Stephens,  
Circuit Judges.**

**[Title of Cause.]**

**ORDER DIRECTING FILING OF OPINION  
AND FILING AND RECORDING OF DE-  
CREES.**

**By direction of the Court, ordered that the type-written opinion this day rendered by this court, in**

above causes be forthwith filed by the clerk, and that a decree be filed in each of said causes and recorded in the minutes of this court in accordance with the opinion rendered.

---

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 8711

**RAY INGELS**, Director of Motor Vehicles of the  
State of California, **HOWARD E. DEEMS**,  
as Registrar of Motor Vehicles of the State of  
California, and the **MOTOR VEHICLE DE-  
PARTMENT OF THE STATE OF CALI-  
FORNIA**,

Appellants,

vs.

**L. BOTELE**R, Trustee of the Estate of **RICH-  
MAID CREAMERIES, INC.**, a corporation,  
Debtor,

Appellee.

No. 8761

Dec. 15, 1938

RAY. INGELS, Director of Motor Vehicles of the  
State of California, and HOWARD E. DEEMS,  
as Registrar of Motor Vehicles of the State of  
California,

Appellants,

vs.

L. BOTELER, Trustee of RICHMAID CREAM-  
ERIES, INC., a corporation,

Appellee.

Upon Appeals from the District Court of the United  
States for the Southern District of California,  
Central Division.

## OPINION

Before: Garrecht, Stephens and Healy,  
Circuit Judges.

Garrecht, Circuit Judge.

The Richmaid Creameries, Inc., filed its petition under Section 77b of the Bankruptcy Act 11 U. S. C. A., Sec. 207) in the court below on September 16, 1936, and on the same day John H. Chamness was appointed temporary trustee, with authority to operate the business of the debtor. Prior to September 16, 1936, The Richmaid Creameries, Inc., was engaged in the creamery business in Wilmington,



California, owning certain milk and ice cream routes and making deliveries thereon and operating twenty-seven automobiles and trucks in the course of such business.

The temporary trustee began to operate the business and borrowed money for that purpose, but his first month of operation of the business resulted in a loss of \$2,865.00. On December 22, 1936, the District Court entered an order directing liquidation of the assets of the debtor, continuing the trustee in office for that purpose, and referred the estate generally to the referee for further administration.

January 5, 1937, a schedule of assets and liabilities of Richmaid was filed, showing assets of \$148,380.02, and liabilities of \$87,089.64, including \$2,000.00 borrowed by the trustee on certificates.

January 20, 1937, L. Boteler, appellee here, was appointed trustee in bankruptcy for the purpose of liquidating the assets of Richmaid.

During the months of January and February, 1937, and up to and including February 27, 1937, the temporary trustee and the trustee, respectively, continued to operate the business of Richmaid and to make the usual deliveries of milk and ice cream on the aforesaid "routes." The trustee issued checks against the estate in payment of expenses in connection with the operation of the business. When there were insufficient funds in the estate to pay the checks, the trustee, on some occasions cashed the same out of his own personal funds and held the checks until there were sufficient funds in the bankrupt estate with which to pay the same.

The total receipts of the trustee from September 16, 1936, to January 19, 1937, were \$70,006.23, and the total disbursements for the same period were \$79,647.65; the total receipts from January 20, 1937, the date when the appellee assumed trusteeship of the estate of Richmaid, to February 4, 1937, were \$7,899.61, while the total disbursements for the same period were \$7,624.46.

Automobile license fees are due and payable in the state of California on the first day of January of each year, to be paid at the time of registration or renewal thereof. (Sec. 3, Calif. Vehicle License Fee Act (Ch. 362, Cal. Stats. 1935, as amended).) Delinquency arises upon operation of a vehicle upon any highway of the State without the license fee having been paid and a penalty attaches if the fee is not paid within 30 days. (Sec. 6, *ibid.*) The penalty is by law added to the fee upon any application for annual renewal of registration made on or after February 5, unless the vehicle has not been operated on the highways of the state since the expiration date. (Sec. 378 (b) Calif. Vehicle Code.) Section 379(a) of the California Vehicle Code provides that every registration or transfer fee and any penalty added thereto from the time the same became due, constitute a lien upon the vehicle for which due.

Continuously during the month of January, 1937, and to and including February 27, 1937, the temporary trustee and the trustee operated the Richmaid

automobiles and trucks upon the public highways of the state of California, carrying on the business of Richmaid.

The trustee did not pay the California 1937 license fees upon said vehicles, in the amount of \$410.90, prior to February 5, 1937. On February 28, 1937, the referee made an order confirming the sale of Richmaid's milk and ice cream delivery routes and certain equipment, for the sum of \$8260.00. This was the first property sold in liquidation, and the trustee did not thereafter attempt to operate the business of the debtor.

On or about February 27, 1937, 23 days after the statutory delinquency date, the trustee made application to the Department of Motor Vehicles of the State of California for 1937 licenses for the motor vehicles referred to, tendering the fees, but not the penalties demanded by the statutes of California for violation of its motor vehicle license laws. Because of the refusal of the trustee to pay the penalties required by the laws of the state of California, the 1937 licenses were not issued to him.

Thereafter, the trustee filed a petition with the referee for an order requiring the appellants here to show cause why the penalties assessed against the Richmaid motor vehicles should not be set aside and, further, to show cause why the 1937 license plates for said motor vehicles should not be issued to the trustee upon payment of the fees, exclusive of the penalties. Following this, the trustee filed an

amended petition to require the appellants to show cause why they should not be required immediately to file such claims as they assert against the bankrupt estate or be forever barred from asserting such claims against said estate or against the motor vehicles, and further requiring said appellants to show why the trustee should not be authorized to sell the motor vehicles free and clear from any and all liens claimed by the motor vehicle department of the state of California upon said vehicles.

The referee made certain findings of fact, most of which are set forth above, but, in addition, the referee made findings as follows:

"The court further finds that the trustee herein had absolutely no funds in his possession between the date of his appointment on the 20th day of January, 1937 and the 27th day of February, 1937 with which to purchase the 1937 license plates for said motor vehicles \* \* \*."

"The court further finds that at no time prior to the 27th day of February, 1937, did said trustee have funds with which to pay said registration and license fees owing upon said motor vehicles and that the same condition existed from the date that the order of liquidation was made herein, to-wit, the 22nd day of December, 1936 to the date of the appointment of L. Boteler, the present trustee on the 20th day of January, 1937. That during the month of January, 1937 and up to the said 27th day of February, 1937,

the trustee herein and his predecessor operated said vehicles upon the public highways of the State of California without the payment of any registration and license fees for said year."

The referee made an order setting aside all penalties assessed against the motor vehicles and directed the trustee to sell said motor vehicles free and clear of any and all liens thereon arising by reason of the failure of the trustee to pay the motor vehicle license tax provided under the laws of the state of California and commanding Ingels and Deems to file claims in the bankruptcy proceeding for the registration and license fees upon said motor vehicles within 30 days from the date of the order "or be forever barred from asserting any claim or claims for taxes and/or registration or license fees against said motor vehicles and against this bankrupt estate or the trustee herein, either in his official capacity as such trustee or individually." The appellants petitioned the District Court to review the said order and the District Judge denied the petition and confirmed the order of the referee.

In addition, the trustee had petitioned the referee for an order directing the appellants to receive the principal of the license fees in full payment of any and all sums owing by Richmaid on said motor vehicles and enjoining collection or attempted collection by them of any penalties which the statutes of the state of California compelled them to collect.



The referee declined to include such mandate in his order, and the trustee made application to the District Court, for a mandatory injunction directed to the appellants requiring them to receive the statutory fees less the penalties and to deliver the license plates to the trustee, which issued the order as prayed.

An appeal was allowed Ingels, Director of Motor Vehicles of the State of California, and Deems, as Registrar of Motor Vehicles, from each order.

The sole question in each case is whether the lower court committed error in entering the order appealed from.

The two cases involved the identical facts, were consolidated for briefing and hearing and are disposed of in this opinion.

The referee made two findings of fact, set forth above, to the effect that the trustee had no funds with which to pay the license and registration fees prior to February 5, 1937. These findings are contrary to the true facts. Actually during the period January 20, 1937, to February 4, 1937, large sums of money were received by the trustee, all of which were received and paid out *before* the license became subject to penalty, without taking into account the moneys received and disbursed in the operation of the business from January 1, to January 19, 1937.

Whether a debt or claim is provable in bankruptcy turns upon its status at the time of the filing of the petition (Sec. 760, Remington on Bank-

ruptcy, 4th ed.); claims not owing at the time of filing of the petition are not provable (Sec. 807, Remington; Colman Co. v. Withoft (C. C. A. 9), 195 F. 250, 252; Cantor v. Cherry (C. C. A. 3), 73 F.(2d) 188). Section 1 (9) of the Bankruptcy Act (11 U. S. C. A., Sec. 1) includes, in the definition of "creditor" anyone who owns a demand or claim provable in bankruptcy. While actually neither demand nor claim, taxes are "provable" in their nature (Sec. 845, Remington).

If the taxes in question were due and payable at the time of the filing of the petition, they would be provable, and, it follows, under Section 57 (j) of the Act (11 U. S. C. A., Sec. 93 (j)), penalties thereon would not be allowable, save to the extent permitted by said section.

But here we are confronted with a different set of facts. These taxes became fixed by reason of the operation of the business by the trustees, after the date of the filing of the petition and after the date of what in effect amounted to an adjudication. It should be obvious that a debt or claim created thereby was not provable, not being in existence at the time of the filing of the petition and, therefore, not dischargeable.

The right of the trustee, under order of the court, to operate the business for a limited period cannot be challenged, but the estate, save as to existing lienholders not consenting—of which there are apparently none here, is liable for the charges incurred, even to the extent of the depletion of the

assets of the estate, even to the detriment of labor claimants. The reason is simple: The operation of the business in such situation is for the benefit of the creditors. Remington, Sec. 2662, 445, 446.

The motor vehicle license or registration fee is a privilege tax levied in exercise of the police power to control and regulate travel on the public highways. It is not considered as a tax on the motor vehicle itself, but for the privilege of using the highways. Blashfield, Cyc. of Automobile Law, Sec. 212, Vol. 1, p. 158. A license to operate a motor vehicle is granted under the inherent right of the state or municipality to regulate its use on the public highways or streets. Ibid., Sec. 211, p. 157. The only automobiles required to be registered under the California Motor Vehicle Act are vehicles to be used upon the public highway (Cal. Stats. 1927, p. 1424; California Standard Finance Corp. v. Riverside Finance Co., 111 Cal. App. 151, 163, 295 P. 555); if the vehicles were not used, no registration fee would have fallen due under the law of California. But, in carrying on the business of Richmaid, the motor vehicles were operated upon the public highways of the state of California and thereby the registration and license fees attached. They were not paid, but became delinquent, and on February 5, 1937, the penalties prescribed by law applied. California Vehicle Code, Sec. 370, et seq.; California Vehicle License Fee Act, Sec. 6.

The motor vehicles in question could not be operated in 1937 without incurring the license and regis-

tration fees. Necessarily, therefore, the fees were an expense of doing business and were chargeable against the estate. The trustee has the duty of seeking out and paying all taxes (Sec. 847, Remington). He knew, or should have known, that a license fee was required before the motor vehicles could be legally operated upon the public highways, although, if the motor vehicles had not been used the fees would not have become payable.

Were the motor vehicles operated by Richmaid itself, or any other person or corporation, there would be no question of liability for the penalties. Is a trustee operating a business absolved from compliance with law?

The trustee cites Section 57 (j) of the Bankruptcy Act (11 U. S. C. A., Sec. 93 (j)) as authority for holding the penalty inapplicable. That section provides that "Debts owing to . . . a State . . . as a penalty or forfeiture shall not be allowed, except . . ." for pecuniary loss, costs and interest. We have already pointed out that the tax in question could not be a provable dischargeable claim. Obviously, the section refers to debts owing by the bankrupt and not by the trustee.

The normal course of procedure in bankruptcy is liquidation, not continuance of the business of the bankrupt. Where the business of the bankrupt is conducted for a limited period by the trustee, upon order of the court, the purpose is to benefit the creditors. The expenses of operation must be paid out of the estate. That the license and registration

fees are legitimate expenses, there can be no question.

By the Act of June 18, 1934, (48 Stat. 993, 28 U. S. C. A., Sec. 124 (a)), a trustee who is authorized by any United States Court to conduct any business, and does so, is subject to all State and local taxes "applicable to such business the same as if such business were conducted by an individual or corporation." This is sufficient basis for the attachment of the penalty and lien.

While the property which was in possession of the bankrupt at the time of filing of the petition, or to which it was entitled, is regarded as in custodia legis, we have been cited to no authority which would prevent a lien granted by State law from attaching by reason of the operation of a business of a bankrupt by a trustee and a violation of the State law by that trustee. The general rule is that the law of the state will control as to the nature of a lien, its creation, the time of taking effect. Sec. 1891, Remington. Under Section 124 (a) of 28 U. S. C. A., it follows that the lien in this case is valid.

The Supreme Court, in the case of Swarts v. Hammer, 194 U. S. 441, 444, said: "By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessary protection by the State and municipality, or which should exempt it from its obligations to either."



In *State of California v. Hisey*, 84 F.(2d) 802, 805, a receivership case, we held that the appointment of a receiver by a court of equity could not have any effect upon the right of the State of California to collect penalties for unpaid taxes that receivers had been compelled in numerous cases to pay penalties for non-payment of taxes which accrued subsequent to their appointment. We further held that "If the penalty, as well as the tax, is a lien upon the property in the hands of a receiver, as the statutes of California provide, it is difficult to see how the payment of the penalty can be differentiated from the payment of the lien for the tax.

\* \* \* The penalty is a part of the tax. \* \* \*

Compare *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 344; *People v. Hopkins* (C. C. A. 2), 18 F.(2d) 731, 733; *McFarland v. Hurley* (C. C. A. 5), 286 F. 365, 366; *Coy v. Title Guarantee & Trust Co.* (C. C. A. 9), 220 F. 90, 92.

This view is upheld by the United States Circuit Court of Appeals for the Second Circuit. In the case of *In re Humeston*, 83 F.(2d) 187, 189, that court said.

"\* \* \* Such taxes as fell due during the period of the trustee's occupation were part of the expenses of that occupation and should be borne by the estate. \* \* \* When \* \* \* the mortgagor's trustee continues the occupation, he necessarily means to exploit it for profit, and the gross returns must pay the running expenses. Thus taxes which became payable be-

tween November 1, 1933, and May 21, 1935, must be paid, and not only the entire face of these, but all interest and *penalties* accumulated upon them. It was the trustee's duty to pay them when they fell due and the estate must suffer from his failure. \* \* \* [Emphasis is by the Court.]

Additional authority may be found In re Preble Corporation (D. C. Me.) 15 F. Supp. 775, 776 (Aff. on different grounds 84 F.(2d) 73; cert. den. 299 U. S. 575):

"Generally speaking, property in the custody and control of federal receivers and trustees is subject to taxation under state law the same as any other property. \* \* \* [Cases cited.]

"A proper performance of the duty to protect the property intrusted to its agents by the court requires the payment of taxes. In this case taxes are a part of the necessary expense of carrying on the business.

"The trustee is subject to all state and local taxes which are applicable to the business which he conducts."

"If the trustee fails to pay taxes in a proper case, although he has sufficient funds to do so, and thereby subjects the estate to interest and penalties, he will be surcharged to the extent of such interest and penalties." Gerdes on Corporate Reorganizations, vol. 1, §400."

Insofar as the decision In re Messenger's Merchants Lunch Rooms, Inc., (C. C. A. 7), 85 F.(2d) 1002, cited by the appellee as authority for affirmance, is in conflict herewith, it is expressly disapproved.

The order of the District Court is reversed in each case, with directions to order the registration and license fees and accrued penalties paid, or, in the alternative, to permit the motor vehicles to be disposed of subject to the lien of the State of California for the unpaid taxes and penalties.

The orders of the court below are reversed.

[Endorsed]: Opinion. Filed Dec. 15, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 8711

RAY INGELS, Director of Motor Vehicles of the  
State of California, et al.,

Appellants,

vs.

L. BOTELER, Trustee of the Estate of RICHMAID  
CREAMERIES, INC., a corporation, Debtor,  
Appellee.

DECREE

Appeal from the District Court of the United  
States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, reversed with directions to order the registration and license fees and accrued penalties paid, or, in the alternative, to permit the motor vehicles to be disposed of subject to the lien of the state of California for the unpaid taxes and penalties, with costs in this court in favor of appellants and against appellee.

It is further ordered, adjudged, and decreed by this Court, that the appellants recover against the appellee for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Dec. 15, 1938.  
Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT, TO RECORD CERTIFIED UN-  
DER RULE 38 OF THE REVISED RULES  
OF THE SUPREME COURT OF THE  
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred forty-five (145) pages, numbered from and including 1 to and including 145, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2nd day of March, A. D. 1939.

[Seal]

PAUL P. O'BRIEN,

Clerk.



[fol. 147] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 24, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3597)